No. 92-831

Supreme Court, U.S.
FILED
NOV 13 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BETHLEHEM STEEL CORPORATION, *et al.*,

Petitioners,

—against—

ROYSWORTH D. GRANT, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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November 13, 1992

Questions Presented

In this Title VII action the Court of Appeals awarded attorneys' fees of approximately $500,000, despite the fact that the plaintiff class recovered only $60,000 in settlement, and held that the amount recovered could not be considered in determining the amount of a reasonable attorneys' fee award in a civil rights action.

The questions presented by this petition are:

1. Must an award of attorneys' fees in a Title VII action be reasonably proportionate to the amount recovered?

2. Must the amount of potential or actual recovery be considered in determining the amount of a reasonable attorneys' fee award?

List of Parties

The parties to the proceedings below were the petitioner Bethlehem Steel Corporation petitioners James Deaver, Thomas R. Connelly and E. Richard Driggers (all of whom were formerly employed by Bethlehem Steel Corporation), and the respondents Roysworth D. Grant and Willie E. Ellis, invidivually and as representatives of a class of Black and Hispanic ironworkers, and respondent Louis Martinez, as plaintiff-intervenor.

Petitioner Bethlehem Steel Corporation does not have any parent companies or subsidiaries to list pursuant to Rule 29.1.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Bethlehem Steel Corporation, James Deaver, Thomas R. Connelly and E. Richard Driggers (collectively referred to herein as "Bethlehem") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on August 18, 1992.

Opinions Below

The opinion of the Court of Appeals is reported at 973 F.2d 96 (2d Cir. 1992). A copy of that opinion is annexed as Appendix A. The judgment of the District Court and the

opinions of the District Court and the Magistrate Judge in the District Court are unreported. Copies of that judgment and those opinions are annexed as Appendices B, C, and D, respectively.

Jurisdiction

The decision of the United States Court of Appeals for the Second Circuit was filed on August 18, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). This petition is filed within the time allowed by law.[1]

Statutes Involved

The statutory provisions involved in this petition are Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), and the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988, which are reproduced in relevant part in Appendix J.

Statement of the Case

This action was commenced in 1976 on behalf of a class of Black and Hispanic ironworkers employed by Bethlehem in the construction of high rise buildings. The complaint asserted that Bethlehem had discriminated against the plaintiff class in the manner by which supervisors chose ironworkers for promotion to foreman.

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[1] Federal jurisdiction in the District Court, according to the complaint, was founded on 5 U.S.C. § 701-06, 18 U.S.C. §§ 1331, 1337, 1343, 1361, 2201, and 2202, 29 U.S.C. §§ 159a and 185, 42 U.S.C. §§ 1981, 1983, 2000d and 2000e, Exec. Order No. 11,246, 30 Fed. Reg. 12,319, *reprinted after* 42 U.S.C.A. § 2000e note (1981), and the Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution.

In 1977, shortly before the scheduled trial date, Bethlehem made an offer of judgment for $40,000, pursuant to Fed.R.Civ.P. 68, for $40,000. As set forth below, class counsel refused to negotiate the question of settlement at that time, and moved to strike the offer of judgment.

In 1982, after trial, after a judgment in Bethlehem's favor, and after an appeal and a reversal for a new trial, the action was settled for a total of $60,000 in damages to the class, without any admission of liability. The District Court's formal approval of that settlement did not take place, however, until July 1986. At that time, plaintiffs' counsel were discharged as counsel for the named plaintiffs, but permitted to continue as counsel for the class. Following further proceedings in the Court of Appeals, the settlement was approved in June 1987, over the objection of all responding class members. *See Grant v. Bethlehem Steel Corp.*, 823 F.2d 20 (2d Cir. 1987). (Appendix E, A63 - A71)

In December 1989, after thirteen years of litigation, class counsel submitted a fee application, seeking fees and costs of $577,331.09. That application was subsequently amended to seek fees of $626,852.94, together with claimed expenses of $7,253.64. That sum included approximately $405,000 for services rendered after Bethlehem made its 1977 offer of judgment. Approximately $79,000 of the $405,000 was for work done after the settlement offer was accepted in 1982, which in turn included approximately $27,000 for ministerial work done in connection with the distribution of the settlement. $6,812 was for the fees of additional counsel retained solely to prepare the fee application.

The Magistrate Judge, to whom the District Court referred the fee application, held that, as a matter of law, the disproportionality between the fees sought and the result ob-

tained for the class was irrelevant in determining a reasonable fee award. (A46 - A51) After making relatively minor adjustments to the claimed amount, the Magistrate Judge awarded fees and expenses of $498,922.34. (A58) Without further analysis, the District Court endorsed the Magistrate Judge's findings and conclusions in a three page order.[2] (Appendix C, A17 - A19)

On appeal, the Court of Appeals affirmed the fee award in its entirety, and explicitly held that disproportionality between the $60,000 relief obtained for the class and the $500,000 fee obtained by its attorneys could not be considered by a District Court in considering an application for fees under 42 U.S.C. §§ 1988 and 2000e-5(k). (Appendix A, A11 - A13)

The Commencement of this Action and Bethlehem's First Settlement Offer

As originally brought in February 1976, this action sought damages for back pay in an unspecified amount and injunctive relief directed to Bethlehem's hiring practices. It was a matter of public record, however, that Bethlehem was in the process of terminating its structural steel business in 1976, so that, when the action was commenced, injunctive relief was unavailable. As a practical matter, therefore, the only available remedy was back pay.

The record developed by the Fall of 1977 showed that Bethlehem had filled only 57 foreman positions within the three year back pay period plaintiffs contended was applica-

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[2] The District Court also awarded plaintiffs' counsel additional fees of $13,667.68 for the work done in proceedings before the District Court in connection with the Magistrate Judge's recommendation on fees, for a total of $512,590.02.

ble, and that no one foreman was employed for the entire period.[3] Plaintiff's theory was that 10% of those positions, or six jobs, should have been filled by Black or Hispanic ironworkers. The pay differential between ironworkers and foremen at the time was approximately $.50 per hour. Even on plaintiffs' theory of the case, therefore, it was evident early in the litigation that the maximum damages that could be recovered for the class were extremely limited in amount.

On October 20, 1977, when discovery was virtually complete, and approximately three months before the scheduled trial date, Bethlehem made an offer of judgment, in accordance with Fed. R. Civ. P. 68, for $40,000, together with "costs, including such reasonable attorneys' fees as may be determined by the Court, accrued to date." Both before and after Bethlehem's offer, plaintiffs' counsel had adamantly refused to negotiate a possible settlement. Rather than consider settlement, plaintiffs' counsel moved to strike the offer of judgment.[4]

An eight day bench trial was held in January 1978. In December of that year, after the trial, the District Court ruled that plaintiffs had failed to prove a *prima facie* case and

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[3] The three year period would have applied only if plaintiffs could demonstrate intentional discrimination under 42 U.S.C. § 1981. Under the Civil Rights Act of 1964, the back-pay period is two years. *See* 42 U.S.C. § 2000e-5(g). According to an affidavit submitted by of one of the attorneys for the class in support of the ultimate $60,000 settlement, the potential back pay available for the two year Title VII period was only $21,000. The balance of the settlement, approximately $39,000, related to that third year. (Appendix H, A122)

[4] The motion to strike the offer of judgment was predicated on grounds of public policy and on a claimed lack of the information neccessary to evaluate the offer, although discovery was virtually complete and trial was imminent.

dismissed the complaint on the merits. On February 26, 1979, the District Court granted plaintiffs' motion to strike Bethlehem's offer of judgment.

Plaintiffs appealed from the dismissal of the action. In 1980, in an opinion reported at 635 F.2d 1007 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981) ("*Grant I*"), (Appendix G, A91 - A116), the Second Circuit reversed the judgment and held that plaintiffs had made out a *prima facie* case. The case was remanded for further proceedings, including proof by Bethlehem of the business necessity of its hiring practices.

Settlement of the Action

In December 1981, the action was referred to a Magistrate Judge to supervise discovery on remand and to explore the possibility of settlement. Plaintiffs' counsel again refused to negotiate a reasonable settlement, even under supervision by the Magistrate Judge. Accordingly, on May 21, 1982, Bethlehem made a second offer of judgment under Fed. R. Civ. P. 68, this time for $60,000, together with "costs accrued to date". As with the 1977 offer, plaintiffs' counsel promptly moved to strike that offer. However, approximately four months later, plaintiffs' counsel purported to accept that offer, although it had expired under Fed. R. Civ. P. 68 ten days after it was served.

Following further discussions between the attorneys for the parties, the action was settled for $60,000. The named plaintiffs immediately opposed the settlement, and the only papers filed in favor of the proposed settlement by plaintiffs were filed by class counsel, without the support of

any of their clients.[5] The principal attorney for the class submitted two long affidavits (Exhibits H and I, A117 - A137), which conclude that "the $60,000 settlement offered by defendants represents as much or more than the plaintiff class is likely to recover if this case goes back to trial." (A117 - A118; *see* A130 - A135) Those affidavits also concede that "[d]ue to the fact that Bethlehem went out of the structural steel business years ago, the possibility of obtaining injunctive relief is nil." (A136)

The Magistrate Judge, in a report dated June 27, 1986, recommended approval of the settlement. His report (Appendix F, A73 - A89) states that "even if plaintiffs were successful on all of their claims, the most they could reasonably expect to recover is the amount of the proposed settlement." (A82 - A83) That report also endorsed class counsel's view that relief other than back pay was "unlikely," principally because Bethlehem was no longer in the structural steel business.

By order dated July 22, 1986, the District Court accepted the Magistrate Judge's recommendation, and the named plaintiffs again appealed. Class counsel opposed that appeal and supported the settlement. By opinion dated June 30, 1987, reported at 823 F.2d 20 (2d Cir. 1987), the Court of Appeals approved the settlement.

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[5] The named plaintiffs, joined by 42 other putative class members, sought to discharge class counsel and to reject the settlement as inadequate. The Magistrate Judge approved the motion of all members of the class who appeared to discharge counsel, but permitted counsel to continue as the attorney for absent class members. As set forth below, such wrangling between the plaintiff class and its attorneys came to characterize this action.

From that affirmance until October 1988, there were further acrimonious proceedings involving the plaintiffs and their former attorneys regarding the distribution of the $60,000 fund.[6] On October 24, 1988, a plan of distribution was finally approved by the District Court. In the actual distribution, it turned out that only sixteen individuals were entitled to share in the proceeds, in amounts ranging from $1,093 to $7,215, with an additional payment of $2,000 to each of the three named plaintiffs.

The Fee Application

In December 1989, class counsel finally filed a fee application. That application, as amended in July 1990, sought over $625,000, which was derived by applying the 1989 hourly rates charged by each of the attorneys who had represented the class since 1976 to every hour which appeared in their actual or "reconstructed" records relating to the case.

Before the Magistrate Judge, the District Court, and the Court of Appeals, Bethlehem argued that the disparity between the fees requested and the potential recovery or the actual results obtained required a drastic reduction in the fee award, especially in light of Bethlehem's repeated efforts to settle the case and class counsel's repeated refusal to negotiate. Indeed, at the rates of interest prevailing for government securities, the $40,000 offer rejected by class counsel in 1977 was worth more than the $60,000 settlement ultimately obtained, both when it was accepted in 1982 and when it was

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[6] Under the order below, Bethlehem must now compensate class counsel for the time expended by them in obtaining approval of the settlement over the objections of the class members, as well as for the distribution proceedings, in which they incurred fees of $27,000 for work which was largely ministerial. (A40 - A41)

distributed in 1988. Accordingly, class counsel's efforts for the 11 years from the first settlement offer until payment to the plaintiffs served only to harm their clients. During that same period, nearly two-thirds of the fees at issue were incurred. Nevertheless, each court below categorically rejected Bethlehem's proportionality argument, holding that, as a matter of law, disparity between the results obtained and the fee sought, however great, was irrelevant to the reasonableness of the claimed fee.

Indeed, the Court of Appeals' decision holds that a reduction of the lodestar amount, whether by reason of limited success or on grounds of proportionality, is always inappropriate except, perhaps, in such cases where the recovery is "nominal". *Compare Estate of Farrar v. Cain*, 941 F.2d 1311 (5th Cir. 1991), *cert. granted sub nom. Estate of Farrar v. Hobby*, 112 S. Ct. 1159 (1992) (Docket No. 91-990) (Argued October 7, 1992). The Court of Appeals held that "the social value inherent in correcting all forms of discrimination" required awards of fees in the full amount of the lodestar calculation, regardless of the private amount of damages at stake or any public interest that might be vindicated. It stated:

> Bethlehem contends [that] the lodestar figure should be reduced in order to achieve proportionality between the fee award and the plaintiff's recovery. . . . Bethlehem, . . . drawing on aspects of Justice Powell's concurrence [in *Rivera*], interprets *Rivera* to require that primary consideration be given to proportionality in the calculation of a fee award, except in the rare case in which the public interest is served by the vindication of constitutional rights. We rejected this interpretation

Rivera in *Cowan v. Prudential Insurance Co. of America*, 935 F.2d 522 (2d Cir. 1991). There we stated that "[a] presumptively correct 'lodestar' figure should not be reduced simply because a plaintiff recovered a low damage award." Rejecting a proposed dichotomy between private damage and public interest cases, in *Cowan* we reasoned that

> Allowing proportionality reductions when a court determines that no public interest was served by a civil rights suit would discount the social value inherent in correcting all forms of discrimination, public or private. Proportionality is contrary to our national policy of encouraging the eradication of every type of racial discrimination.

Bethlehem argues that Cowan steered our jurisprudence off the course set by the Supreme Court and that we should take this opportunity to correct our course. We disagree.

(A11 - A12)

It is clear, therefore, that the Second Circuit has established a rule that (with the possible exception of cases involving nominal damages) the full lodestar amount must be awarded regardless of the amount in controversy or the amount recovered.

Reasons For Granting The Writ

While the right of a prevailing plaintiff in a civil rights action to recover attorneys' fees plays a key role in

enforcing the civil rights laws, those fees are required by statute to be "reasonable". This Court should issue a writ of certiorari and reverse the judgment below to establish the rule that the fee is required to be reasonably in proportion to the amount at issue for the plaintiff and to the results obtained. This Court should establish a uniform national standard for evaluating fee applications which will fairly compensate those who represent civil rights plaintiffs, without encouraging the prosecution of marginal claims or the overlitigation of meritorious cases which have only limited prospects for recovery.

I.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT AND RECURRING ISSUE UNDER THE CIVIL RIGHTS LAWS WHICH SHOULD BE RESOLVED BY THIS COURT

Every action for deprivation of civil rights carries with it the right of a prevailing plaintiff to be awarded reasonable attorneys' fees. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), this Court held that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." 461 U.S. at 433 (citation and footnote omitted).[7] The Court noted, however, that this "generous formulation . . . brings the plaintiff only across the statutory threshold. It remains for the District Court to determine what fee is 'reasonable.'" 461 U.S. at 433.

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[7] Estate of Farrar v. Hobby (No. 91-990) (Argued October 7, 1992), which is presently *sub judice*, raises the related issue of whether 42 U.S.C. § 1988 authorizes the award of reasonable attorneys' fees to civil rights plaintiffs who recover only nominal damages.

The opinion below, unless reversed, establishes a clear rule that in a civil rights action, neither the reasonably anticipated benefit to the plaintiff nor the actual results obtained are to be considered by a district court when evaluating a fee application. Because fee-shifting provisions occupy a key role in all civil rights legislation, it is important for this Court to reject that view and establish instead that the reasonableness of a fee depends, in the first instance, on the benefit conferred on the client.[8]

The goal of the fee-shifting provisions at issue is to enable civil rights plaintiffs to obtain the same access to the judicial process as parties able to retain counsel on a fee-paying basis. *See City of Riverside v. Rivera*, 477 U.S. 561, 591-92 (1986) (Rehnquist, J., dissenting) (citing and discussing legislative history). The rule adopted below, however, puts the lawyer who looks to the adverse party for his fee in a better position than one who is to be paid by his client, because in such a case there is no need to exercise any billing judgment. Under the rule adopted by the Court of Appeals, a lawyer who expects to be paid by his adversary has a powerful incentive to increase the "lodestar" by expending a maximum number of hours in every case, without regard to what is at stake for his client or the likely recovery in the litigation. Instead of the billing discipline which private counsel are required to exercise in advising clients and determining litigation strategy, the Court of Appeals' rule

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[8] Where one of the goals of litigation is to secure non-monetary relief, the rule should still be that the fee must bear a reasonable relationship to the actual or potential benefits to the plaintiffs. Here, although the plaintiffs purportedly sought injunctive relief, they knew that it was never a real possibility, as class counsel conceded in the affidavits supporting the settlement. (A123) Nonetheless, the chimera of injunctive relief in what was, in reality, an action for modest damages, was cited by every court below as a factor in rejecting a rule of proportionality.

encourages extravagant and wasteful effort in virtually every case. The record in this action is an apt illustration of how those perverse incentives operate to encourage litigation and to inflate fees.

For an ordinary fee-paying client, the key elements in determining the reasonableness of an attorney's fee are the potential benefit to be gained from litigation and the actual results obtained. Indeed, it is an ethical violation for an attorney to charge a fee which fails to take account of "the amount involved and the results obtained." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a)(4) (1984). *Accord*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (B)(4) (1978).[9] That common sense standard has generally been followed under the many federal statutes awarding a reasonable fee to a prevailing party. *See, e.g., United States Football League v. National Football League*, 887 F.2d 408 (2d Cir. 1989) (fee in antitrust action reduced in light of limited recovery), *cert. denied*, 493 U.S. 107 (1990); *Gary v. Health Care Services, Inc.*, 744 F. Supp. 277, 280-81 (M.D. Ga. 1990), *aff'd*, 940 F.2d 673 (11th Cir. 1991) (Fair Labor Standards Act); *Curry v. Contract Fabricators Inc. Profit Sharing Plan*, 744 F. Supp. 1061, 1071-72 (M.D. Ala. 1988), *aff'd*, 891 F.2d 842 (11th Cir. 1990) (ERISA); *Friends of the Earth v. Eastman Kodak Co.*, 656 F. Supp. 513, 516-17 (W.D.N.Y.), *aff'd*, 834 F.2d 295 (2d Cir. 1987) (Clean Water Act).[10]

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[9] For example, virtually all states impose a limit on the size of contingent fee arrangements that may be negotiated by attorneys in tort cases.

[10] The fee shifting provisions set out in 42 U.S.C. §§ 2000e-5(k) and 1988 were patterned on the equivalent provisions of the antitrust and securities laws. *See Hensley*, 461 U.S. at 433 n.7 (citing S. REP. NO. 1011, 94th Cong., 2d Sess. 4 (1976)).

In this case it was conceded by class counsel, in their own affidavits, that $60,000 was the most that could possibly have been obtained after trial and that the possibility of injunctive relief against Bethlehem was "nil". (A117 - A137) It is also uncontradicted that class counsel categorically rejected a $40,000 offer of judgment five years before ultimately accepting $60,000, and that the result in real economic terms was a diminution in the benefit to the class.

If, in this action, a fee-paying client had been told in 1976 that, after 16 years of litigation, he would be billed approximately $500,000 for a maximum possible recovery of $60,000, it is likely that the action would not have been brought, or that other counsel with a better sense of proportion would have been retained. If that same hypothetical client had been induced by counsel to litigate from 1977, when Bethlehem's original $40,000 offer was rejected, until 1982, when the $60,000 settlement was reached, a bill for the hundreds of thousands of dollars pointlessly expended in those five years would likely have gone unpaid, especially given the expressed view of plaintiffs' counsel that $60,000 was as much or more than could have been recovered after trial, so that the years subsequently spent in litigation imposed a cost and not a benefit on the client.[11] This Court should clarify that the same standards of prudence and judgment apply when the adverse party is expected to pay a fee as prevail elsewhere in the profession.

The decision below, if allowed to stand, frees the attorney representing a civil rights plaintiff from any such

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[11] Indeed, such a client would likely have demanded that his counsel explain how in 1982 he knew that $60,000 was the limit of the possible recovery, but on the eve of trial in 1977 recommended refusing to even negotiate a $40,000 offer.

constraint. So long as some recovery, however small, can be obtained, no legal effort, however extravagant when measured against the "amount involved and the results obtained," will go uncompensated.

While the fee-shifting provisions of the civil rights laws play a key role in ensuring that meritorious claims are brought by those who cannot otherwise afford counsel, the inflexible rule established by the Court of Appeals will reward those who clog the courts with trivial cases and who overlitigate cases in which little is at stake. Indeed, the rule established by the Court of Appeals provides counsel with a positive economic incentive to overlitigate civil rights cases and to pursue cases of questionable value even in the face of *bona fide* settlement efforts by defendants.

As Judge Aldrich, sitting by designation in the District Court, held in reducing a fee award under 42 U.S.C. § 1988 in light of the small recovery obtained:

> While . . . the fee award is "to attract competent counsel," I do not read this language to mean that Congress intended that every person who could claim an invasion of civil rights, no matter how minor, would be entitled to retain counsel at the defendant's expense, no matter how great. *There must be an element of reason; the fee must not be such as to encourage the overpressing of marginal claims, a by no means idle fear.*

Furtado v. Bishop, 84 F.R.D. 671, 677 (D. Mass. 1979) (footnote and citations omitted) (emphasis added), *modified as to fees on prior appeal*, 635 F.2d 915 (1st Cir. 1980). The opinion below, if affirmed, virtually guarantees that a flood

of marginal or trivial claims will be pressed in litigation. This Court should issue a writ of certiorari and reverse the judgment below to carry out the Congressional mandate that the fees awarded in civil rights cases must be "reasonable".

II.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT

Hensley v. Eckerhart, 461 U.S. 424 (1983), held that a court considering a fee request in a civil rights action must weigh the requested fee against the result obtained:

> If . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. *Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.*
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> . . . .
>
> There is no precise rule or formula for making these determinations. The District Court may attempt to identify specific hours that should be eliminated, or it may simply

> reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified.

Id. at 436-37 (emphasis added).[12]

Hensley's approach to proportionality in determining the reasonableness of a fee was amplified in *City of Riverside*

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[12] The opinion below suggests that *Hensley* is restricted to situations in which a plaintiff's success is limited because he or she failed to secure relief on one or more discrete claims. (A9 - A10) While *Hensley* does address that situation, it is equally applicable to a plaintiff whose overall success on interrelated claims is out of proportion to the requested fee. In *Hensley*, the Court stated:

> Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

461 U.S. at 435. *See id.* at 438 n.14 ("[T]he extent of a plaintiff's success is a crucial factor that the district courts should consider carefully in determining the amount of the fees to be awarded.") The Court of Appeals' suggestion that *Hensley's* requirement of an adjustment for limited success does not apply to overall success is contrary to the interpretation followed in other circuits. *See, e.g., Sanders v. Brewer*, 972 F.2d 920 (8th Cir. 1992); *Foley v. City of Lowell*, 948 F.2d 10 (1st Cir. 1991); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) (cited in the Senate Report on the Civil Rights Attorneys Fees Awards Act of 1976, *see* S. REP. NO. 1011, 94th Cong., 2nd Sess. 6, *reprinted at* 1976 U.S. CODE CONG. & ADMIN. NEWS 5908, 5913, and in *Hensley*, 461 U.S. at 434 n.9).

v. Rivera, 477 U.S. 561 (1986). Although the Court was sharply divided over the fairness of the District Court's fee award in that particular case, the plurality, concurring and dissenting opinions all agreed that degree of success achieved for the plaintiff was to be considered in weighing a fee application. Justice Brennan, writing for a plurality of four Justices, stated that "[t]he amount of damages a plaintiff recovers is certainly relevant to the amount of attorney's fees awarded under § 1988." *Rivera,* 477 U.S. at 574 (citation omitted).

Justice Rehnquist, writing for the four Justices in dissent, emphasized the importance of the result obtained in evaluation a fee application:

> "[T]he most important factor" in determining a "reasonable" fee is the "results obtained". The very "reasonableness" of the hours expended on a case by a plaintiff's attorney necessarily will depend, to a large extent, on the amount that may reasonably be expected to be recovered if the plaintiff prevails.

Rivera, 477 U.S. at 593 (Rehnquist, J., dissenting) (citing *Hensley,* 461 U.S. at 434).

Justice Powell, whose concurring opinion decided the case, concluded that proportionality in private civil rights actions for damages is almost always required:

> Where recovery of private damages is the purpose of a civil rights litigation, a District Court in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought.

477 U.S. at 585 (Powell, J., concurring).

Although Justice Powell joined Justices Brennan, Marshall, Stevens and Blackmun in the judgment, that result was based on his conclusion that the District Court's findings were not clearly erroneous on the particular and rather striking facts presented there, including the findings of widespread official racism and outright "lawlessness" by a local government. Justice Powell's concurrence, which requires the District Courts to give "primary consideration" to the result obtained, and to award a greatly disproportionate fee only in the "rare case" where the benefit to the public interest is so great as to justify a disproportionate award, 477 U.S. at 586 n.3 (Powell, J., concurring), sets forth the narrow ground upon which the judgment in *Rivera* rests. Accordingly, it is that concurrence, and not the plurality opinion, that states the holding of the Court in *Rivera*.[13]

The rule of *Rivera*, therefore, is that a District Court is ordinarily "obligated to give primary consideration to the amount of damages awarded" and is permitted to award a disproportionate fee only in the "rare case" where a substan-

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[13] In construing a decision of this Court where at least five Justices have not joined in one opinion, the rule is that:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."

Marks v. United States, 430 U.S. 188, 193 (1977). *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 764 (1988).

tial public benefit has been conferred.[14] Here, the Court of Appeals, by refusing to consider the relationship between the limited potential recovery or the actual recovery obtained and

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[14] In a concluding one paragraph dictum, the Court of Appeals suggested that its opinion in *Grant I* had conferred such a "public benefit" that the full lodestar amount would be the proper fee under a rule of proportionality. That suggestion does not withstand scrutiny. First, an examination of *Grant I* shows that it hardly qualifies as one of the "rare cases" described by Justice Powell; all that *Grant I* established was that plaintiffs had made out a *prima facie* case that the promotion policies followed by Bethlehem in a long-closed business had a discriminatory effect. Any claim that *Grant I* broke new legal ground under Title VII is refuted by a reading of the opinion. Moreover, the record is devoid of any showing that similar practices were followed by other employers, although the Court of Appeals referred vaguely to *Grant I*'s impact on other employers.

Simply receiving a judicial opinion that confers no benefit on the plaintiff, however favorable the language, does not provide the basis for an award of attorneys' fees under Section 1988. *See Rhodes v. Stewart*, 488 U.S. 1 (1988); *Hewitt v. Helms*, 482 U.S. 755, 759-62 (1987); *Estate of Farrar v. Cain*, 941 F.2d 1311, 1317 (5th Cir. 1991), *cert. granted sub nom. Estate of Farrar v. Hobby*, 112 S. Ct. 1159 (1992). It is not sufficient for a party to obtain a favorable opinion; he must also obtain relief by reason of it. "The real value of the judicial pronouncement . . . is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*" *Helms*, 482 U.S. at 761 (emphasis in original). *Grant I* only held that plaintiffs had made out a *prima facie* case and placed the case back on the trial calendar; it in no way altered the behavior of Bethlehem towards the class. Indeed, *Grant I* explicitly left open the possibility that, on remand, Bethlehem could establish that business necessity justified its promotion practices, and class counsel, in support of the settlement, conceded that Bethlehem might prevail on the second trial. (A123) As the Court stated in *Helms*, "[t]hat is not the stuff of which legal victories are made." 482 U.S. at 760.

Most important, even a proper finding that a particular litigation served the public interest does not require a district court automatically to award the entire fee sought. Rather, the public interest should be one factor to be considered by a district court in deciding whether or not to depart from the general rule of proportionality.

the fees sought, has disregarded the holdings of *Hensley* and *Rivera*.[15]

While the Second Circuit has taken the most extreme view among the courts of appeals in refusing to follow *Hensley* and *Rivera*, other circuits have also failed to follow the rule of proportionality established by this Court, with widely varying results. *See*, *e.g.*, *Sanders v. Brewer*, 972 F.2d 920 (8th Cir. 1992) (plaintiff recovered $11 in damages; court only reduced $14,000 fee application to $7,500); *Wallace v. Mulholland*, 957 F.2d 333 (7th Cir. 1992) (after a recovery of approximately $20,000, court only reduced fee application from $60,000 to $43,000); *Foley v. City of Lowell*, 948 F.2d 10 (1st Cir. 1991) (fee application sought an amount more than five times greater than the recovery; court reduced the application by only one-third); *Northeast Women's Center v. McMonagle*, 889 F.2d 466 (3d Cir. 1989) (court awarded $60,000 in fees on a $3,000 recovery; any adjustment for proportionality rejected), *cert. denied*, 494 U.S. 1068 (1990). Those widely varying interpretations call for a reiteration and clarification of the rule of *Hensley* and *Rivera*. This Court should issue a writ of certiorari and reverse the judgment below to implement the teachings of *Hensley* and *Rivera*, and to establish a uniform national rule on a federal statutory issue of great significance in enforcing the civil rights laws.

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[15] The decision of the court below is in further conflict with Justice Powell's concurrence, *see Rivera*, 477 U.S. at 585 (Powell, J., concurring), in its refusal to distinguish between "public" and "private" civil rights cases in setting fee awards pursuant to section 1988. The Court of Appeals "[r]eject[ed] a proposed dichotomy between private damage and public interest cases." (A12) *See also Cowan v. Prudential Life Ins. Co. of America*, 935 F.2d 522, 526 (2d Cir. 1991). Under the Court of Appeals' holding, every civil rights action is the "rare case" described by Justice Powell.

Conclusion

For the reasons set forth above, this Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

November 13, 1992

Respectfully submitted,

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APPENDIX A

Grant v. Bethlehem Steel Corp.,
973 F.2d 96 (2nd Cir. 1992)

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Argued June 2, 1992.

Decided Aug. 18, 1992.

No. 1645, Docket 92-7255

Roysworth D. GRANT, Willie E. Ellis, on behalf of themselves, and all other similarly situated,
Plaintiffs-Appellees,

v.

Louis MARTINEZ,
Plaintiff-Intervenor,

v.

BETHLEHEM STEEL CORPORATION,
James Deaver, Thomas R. Connelly, Richard Driggers,
Defendants-Appellants.

Title VII plaintiffs sought attorney fees for class counsel after settlement of employment discrimination suit. The United States District Court for the Southern District of New York, Whitman Knapp, J., awarded plaintiffs $512,590.02 in attorney fees and cost. Defendants appealed. The Court of Appeals, Oakes, Chief Judge, held that: (1) class counsel postoffer hours were reasonable: (2) time spent defending

settlement against challenges brought by class members was properly included in lodestar calculations: (3) use of current rates to calculate lodestar, rather than historic rates was not abuse of discretion; and (4) downward adjustment of lodestar figure for alleged "limited success" was not warranted, even though parties settled for only $60,000 and did not receive all relief requested.

Affirmed.

Wayne A. Cross, New York City (Janet E. Mattick, Reboul, MacMurray, Hewitt, Maynard & Kristol, of counsel), for defendants-appellants.

Leon Friedman, New York City (Richard A. Levy, Eisner, Levy, Pollack & Ratner, Lewis M. Steel, Steel & Bellman, of counsel), for plaintiffs-appellees and plaintiff-intervenor.

Before: OAKES, Chief Judge,*
NEWMAN and McLAUGHLIN, Circuit Judge.

OAKES, Chief Judge:

This appeal requires us to revisit the controversy surrounding the hiring practices of Bethlehem Steel Corporation's Fabricating Steel Construction Division. Before us is an appeal from a judgment of the United States District Court for the Southern District of New York, Whitman Knapp, Judge, awarding appellees $512,590.02 in attorneys' fees and costs pursuant to Title VII of the Civil Rights Act, 42 U.S.C.

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*After argument but before decision, Chief Judge Oakes became a Senior Circuit Judge.

§ 2000e-5(k) (1988) and 42 U.S.C. § 1988 (1988). Appellants Bethlehem and three of its supervisory employees (hereinafter "Bethlehem") contend that the district court erred in calculating the lodestar and in failing to adjust the lodestar downward due to appellees' limited success. We disagree; therefore, we affirm the judgment of the district court.

I

The background of this appeal is set forth in detail in *Grant v. Bethlehem Steel Corp. ("Grant I")*, 635 F.2d 1007 (2d Cir. 1980), *cert. denied*, 452 U.S. 940, 101 S.Ct. 3083, 69 L.Ed.2d 954 (1981) and in *Grant v. Bethlehem Steel Corp. ("Grant II")*, 823 F.2d 20 (2d Cir. 1987)—familiarity with which is assumed. We present, therefore, only the facts particularly relevant to the issues before us on appeal.

Appellees filed this class action in 1976 alleging that Bethlehem, in selecting foremen for their structural steel operations, had discriminated against Hispanic and African-American workers in violation of Title VII, 42 U.S.C. §§ 2000e-17 (1988) and 42 U.S.C. § 1981 (1988). The suit, which focused on Bethlehem's word-of-mouth hiring practices sought injunctive relief as well as damages. Bethlehem offered to settle the suit, pursuant to Federal Rule of Civil Procedure 68, for $40,000 plus attorneys' fees and costs on October 20, 1977. Appellees rejected that offer and moved to strike it on the grounds that discovery was still in progress and both the extent of the damages and the size of the class had yet to be determined; therefore, appellees argue, settlement would have been premature in 1977. The district court denied appellees' motion without prejudice to their right to renew the motion at a later date.

In 1978, following an eight-day bench trial, the district court found that appellees had failed to establish a prima facie case. After trial, Bethlehem sought to invoke Rule 68 to obtain costs. Appellees renewed their motion to strike the offer of judgment and the district court granted the motion.

In *Grant I*, 635 F.2d at 1016-18, we reversed the district court, finding that appellees had established a prima facie case of both discriminatory impact and discriminatory treatment. Although we remanded to allow Bethlehem the opportunity to prove that its conduct resulted from a business necessity, *Grant I* established that subjective hiring criteria, then prevalent in the construction industry, were not immune to judicial scrutiny. On remand, the district court directed Magistrate Judge Bernikow to explore the possibility of settlement with the parties. In 1982, class counsel and Bethlehem agreed to settle for $60,000 plus attorneys' fees and cost. In 1986, the district court approved the settlement over a challenge by the named plaintiffs. Following our affirmance of the district court's order in *Grant II*, 823 F.2d at 24, the case once again was referred to the Magistrate Judge to determine the method of distributing the settlement to the class. On October 24, 1988, the district court approved the recommended method of distribution.

On December 21, 1989, class counsel made an application for fees. After additional discovery by Bethlehem and briefing by the parties, the Magistrate Judge recommended an award of $498,922.34, a $127,920.31 reduction of appellees' initial fee application. The district court adopted the Magis-

trate Judge's report and recommendation in a judgment dated February 26, 1992.[1] Bethlehem appeals from this judgment.

II

Both 42 U.S.C. § 1988 and 42 U.S.C. § 2000e-5(k) provide that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." Relief, of course, need not be judicially decreed for a party to be eligible for a fee award. *See Hewitt v. Helms*, 482 U.S. 755, 760-61, 107 S.Ct. 2672, 2675-76 96 L.Ed.2d 654 (1987); *Maher v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 2574, 65 L.Ed.2d 653 (1980). Bethlehem thus does not challenge that appellees fall within the meaning of the term "prevailing party," even though the dispute was resolved through settlement. Instead, Bethlehem contends that (1) the district court erred in assessing the lodestar; (2) the lodestar should have been adjusted downward due to the appellees' limited success; and (3) the fee award was out of proportion to the damages awarded to the appellee. In assessing Bethlehem's argument, we must bear in mind that the district court has wide discretion in determining the amount of attorneys' fees to award; thus, absent an abuse of discretion or an error of law we will not disturb the district court's assessment of the appropriate fee award. *Chambless v. Masters, Mates & Pilots Pension Plan*, 885 F.2d 1053, 1057-58 (2d Cir.1989), *cert. denied*, 496 U.S. 905, 110 S.Ct. 2587, 110 L.Ed.2d 268 (1990); *see also Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983).

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[1] The final award, which totaled $512,590.02, included and additional $13,676.68, the amount that appellees incurred in defending the Magistrate Judge's report before the district court.

A. *Calculation of the Lodestar*

Once a district court determines that a party has prevailed, it must calculate what constitutes a reasonable attorney's fee. The lodestar approach governs the initial estimate of reasonable fees. *Blanchard v. Bergeron*, 489 U.S. 87, 94, 109 S.Ct. 939, 944, 103 L.Ed.2d 67 (1989); *Hensley*, 461 U.S. at 433, 103 S.Ct. at 1939. Under this approach, the number of hours reasonably expended on the litigation is multiplied by a reasonable hourly rate for attorneys and paraprofessionals. Bethlehem challenges the district court's assessment of both the number of hours expended by class counsel and the hourly rate used to calculate the lodestar.

With regard to the hours expended, Bethlehem levels a number of challenges to the district court's assessment of the hours expended by class counsel two of which merit consideration. First, Bethlehem objects to all billings by class counsel subsequent to the 1977 settlement offer on the grounds that these hours did not contribute sufficiently to the monetary relief ultimately obtained by appellees; therefore, they claim that these hours were unreasonable. Bethlehem's argument, however, succeeds only if we were to engage in an *ex post facto* determination of whether attorney hours were necessary to the relief obtained. The relevant issue, however, is not whether hindsight vindicates an attorney's time expenditures, but whether, at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures. *Wooldridge v. Marlene Indus. Corp.*, 898 F.2d 1169, 1177 (6th Cir.1990). Applying this analysis we are unable to say that class counsel's postoffer hours were unreasonable. At the time of Bethlehem's offer, appellees lacked the information necessary to evaluate the offer. Furthermore, at that time it was apparent to neither the district court nor to the appellees that only monetary relief

was appropriate, even though Bethlehem's Construction Division has ceased operations. For example, the district court, in an order dated January 27, 1977, suggested that some form of injunctive relief—such as training programs for minority steel workers—might still be feasible.

Second, Bethlehem argues that the time that class counsel spent defending the 1982 settlement against challenges brought by class members should be excluded from the lodestar calculation. Bethlehem estimates that between June 1981 and June 1987 class counsel expended in excess of 354.9 lawyer hours and 47.7 paralegal hours in attempts to resolve disputes among class members as to the fairness of the 1982 settlement offer.[2] Although the Magistrate Judge and the district court excluded 50 attorney hours from the fee calculation—hours attributable to opposing the named plaintiffs' motion to dismiss class counsel—they approved the hours spent defending the settlement agreement. Federal Rule of Civil Procedure 23(e) provides that proposed settlements of class action suits are subject to court approval and class counsel shouldered the burden of defending the settlement before the Magistrate Judge and the district court. As the Magistrate Judge noted, "The alternative to counsel's effective advocacy would have been further settlement negotiations or trial, either of which would likely have required considerable resources." Given class counsel's role in establishing the fairness of the settlement, which benefitted both the class members and Bethlehem, we find that the district court did not abuse its discretion in including in the lodestar calculation the time expended defending the settlement.

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[2] Class counsel, in contrast, claim that many of the post-settlement hours were spent on administrative tasks necessary to the division of the settlement and not on defending the settlement.

Bethlehem brings numerous other challenges to the reasonableness of the hours expended by class counsel. Having considered these arguments, we conclude that the district court did not abuse its discretion in determining the hours for which class counsel may receive compensation.

With regard to the hourly rate used to calculate the lodestar, Bethlehem argues that the district court should have used the rates charged when counsel performed the work (the historic rate) instead of the current rate of $225 per hour for the senior class counsel. The practice in this circuit had been to apply the historic rate, or in the case of protracted litigation, to divide the litigation into two periods, applying the current rate to the recent phase and the historic rate to the earlier phase. *See New York State Ass'n for Retarded Children v. Carey,* 711 F.2d 1136, 1153 (2d Cir.1983). In *Missouri v. Jenkins,* 491 U.S. 274, 284, 109 S.Ct. 2463, 2469, 105 L.Ed.2d 229 (1989), however, the Supreme Court observed that it is within the discretion of the district court to make "an appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise." *See also Huntington Branch, NAACP v. Town of Huntington,* 961 F.2d 1048, 1049 (2d Cir.1992); *Chambless,* 885 F.2d at 1060. In protracted litigation, therefore, a district court has the latitude to depart from the two phase approach and may calculate all hours at whatever rate is necessary to compensate counsel for delay. *See Cowan v. Prudential Ins. Co. of America,* 728 F.Supp. 87, 92 (D.Conn.1990), *rev'd on other grounds,* 935 F.2d 511 (2d Cir.1991). In the case at hand, counsel has represented appellees since 1976 without compensation. After *Jenkins,* it was within the district court's discretion to compensate class counsel fully for the delay by taking into account the prevailing time-value of money—whether by applying the judgment interest rate set forth in 28 U.S.C. §

1961 (1988) or the historic prime rate.[3] The method of compensation for delay selected by the district court resulted in less than full compensation for the delay; thus, Bethlehem has failed to establish that the district court abused its discretion by using current rates to calculate the lodestar.

B. *Adjustment for Limited Success*

The determination of the amount of the award does not end with the lodestar calculation. Although there is a "'strong presumption' that the lodestar figure represents the 'reasonable' fee," *City of Burlington v. Dague*, — U.S. —, —, 113 S.Ct. 2638, 2641, 120 L.Ed.2d 449 (1992), other considerations may lead to an upward or downward departure from the lodestar. *See Hensley*, 461 U.S. at 434, 103 S.Ct. at 1939. The party advocating such a departure, however, bears the burden of establishing that an adjustment is necessary to the calculation of a reasonable fee. *United States Football League v. National Football League*, 887 F.2d 408, 413 (2d Cir. 1989), *cert. denied*, 493 U.S. 1071, 110 S.Ct. 1116, 107 L.Ed.2d 1022 (1990).

Bethlehem argues that the lodestar should have been adjusted downward to reflect appellees' limited success. In *Hensley*, 461 U.S. at 434-37, 103 S.Ct. at 1939-41, the Supreme Court set forth an analytic framework for determining whether a plaintiff's partial success requires a reduction in the lodestar. At step one of this analysis, the district court examines whether the plaintiff failed to succeed on any claims wholly unrelated to the claims on which the plaintiff succeeded. The hours spent on such unsuccessful claims should be

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[3] According to class counsel, the judgment interest rate would result, in effect in a hourly rate of $282.55 for senior counsel and the use of the prime rate would result in an hourly rate of $339.

excluded from the calculation. *id.* at 434-35, 103 S.Ct. at 1939-40; 2 Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation* 276-77 (2d ed. 1991). At step two, the district court determines whether there are any unsuccessful claims interrelated with the successful claims. If such unsuccessful claims exist, the court must determine whether the plaintiff's level of success warrants a reduction in the fee award. *Hensley,* 461 U.S. at 436,0103 S.Ct. at 1941; 2 Schwartz & Kirklin, *supra,* at 278. If a plaintiff has obtained excellent results, however, the attorneys should be fully compensated. *Hensley,* 461 U.S. at 435, 103 S.Ct. at 1940.

In the present case, all of appellees' claims were based on a common core of facts, thus there were no unrelated claims to which step one of the *Hensley* analysis might be applied. Bethlehem contends that appellees' success was limited—under the second step of the *Hensley* analysis—because they did not obtain the injunctive relief originally requested and because of the low settlement amount. Thus, we must determine whether either failure to receive all relief requested or litigation that results in a low recovery falls within the meaning of "limited success."

Bethlehem's argument that appellees' achieved limited success because they failed to receive all the relief they requested in unavailing. In *Hensley,* 461 U.S. at 436 n. 11, 103 S.Ct. at 1941, the Court recognized that "a plaintiff who failed to recover damages but obtained injunctive relief, or vice versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time." *See also Davis v. Mason County,* 927 F.2d 1473, 1489 (9th Cir.) *cert. denied,* -- U.S. —, 112 S.Ct. 275, 116 L.Ed.2d 227 (1991); *McCann v. Coughlin,* 698 F.2d 112, 129 (2d Cir. 1983). That determination lies largely within the discretion of the district court.

Judge Knapp and Magistrate Judge Bernikow commented on counsel's outstanding skill and the settlement resulted in a recovery that Bethlehem admits was "more than [appellees] could ever have recovered had they won all their claims at trial." Bethlehem thus has not established that the district court abused its discretion in finding that the relief received by appellees justified the fee award.

Bethlehem next argues that the fee award granted by the district court was out of proportion to the damage award. We have previously determined that the lodestar figure may be reduced in situations in which plaintiffs received only nominal damage awards. *United States Football League,* 887 F.2d at 411-12. But such a reduction would be inappropriate in the case at hand where the parties settled for $60,000—an amount that defies the "nominal" label. Bethlehem argues that the phrase "limited success" encompasses damage awards that are merely small relative to the lodestar figure; thus, Bethlehem contends, the lodestar figure should be reduced in order to achieve proportionality between the fee award and the plaintiff's recovery. A majority of the Supreme Court, however, has rejected such a per se proportionality *rule. City of Riverside v. Rivera,* 477 U.S. 561, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986) (4-1-4 decision). The plurality in *Rivera* rejected a proportionality rule in all circumstances. *Id.* at 574-78, 106 S.Ct. at 2694-96. Justice Powell, who concurred in the judgment on the grounds that the district court's findings of fact were not clearly erroneous, commented that "[n]either the decisions of this Court nor the legislative history of § 1988 support such a 'rule.'" *Id.* at 585, 106 S.Ct. at 2699 (Powell, J., concurring). Bethlehem, in contrast, drawing on aspects of Justice Powell's concurrence, *see Rivera,* to 477 U.S. at 586 n. 3, 106 S.Ct. at 2700 n. 3 (Powell, J., concurring), interprets *Rivera* to require that primary consideration be given to proportionality in the

calculation of a fee award, except in the rare case in which the public interest is served by the vindication of constitutional rights. We rejected this interpretation of *Rivera* in *Cowan v. Prudential Insurance Co. of America,* 935 F.2d 522 (2d Cir.1991). There we stated that "[a] presumptively correct 'lodestar' figure should not be reduced simply because a plaintiff recovered a low damage award." *Id.* at 526; *see also Davis v. Southeastern Pa. Transp. Auth..,* 924 F.2d 51, 54 (3d Cir.1991); *Jackson v. Crews,* 873 F.2d 1105, 1110 (8th Cir. 1989); *Cunningham v. City of McKeesport,* 807 F.2d 49, 54-54 (3rd Cir.1986), *cert. denied,* 481 U.S. 1049, 107 S.Ct. 2179, 95 L.Ed.2d 836 (1987). Rejecting a proposed dichotomy between private damage and public interest cases, in *Cowan* we reasoned that

> Allowing proportionality reductions when a court determines that no public interest was served by a civil rights suit would discount the social value inherent in correcting all forms of discrimination, public or private. Proportionality is contrary to our national policy of encouraging the eradication of every type of racial discrimination.

Cowan, 935 F.2d at 527-28.

Bethlehem argues that *Cowan* steered our jurisprudence off the course set by the Supreme Court and that we should take this opportunity to correct our course. We disagree. Furthermore, even if we were to introduce a proportionality analysis in private damage cases in which the public interest is not vindicated, as Bethlehem contends we should, we would still affirm the judgement of the district court in this case. The monetary settlement in this case does not fully reflect the benefit the public gleaned from the litigation leading up to the settlement: the precedent that this case helped to establish contributed to changes in the hiring

practices of the building trades and opened the courts to other meritorious civil rights claims. In so doing, appellees vindicated a policy that Congress considered of the highest importance, *see Rivera,* 477 U.S. at 575, 106 S.Ct. at 2694—a public benefit for which appellees and their counsel may be compensated.

For the reasons set forth above, we affirm the judgment of the district court.

APPENDIX B

Grant v. Bethlehem Steel Corp.,
No. 76 Civ. 0847 (WK)
(S.D.N.Y. Feb. 21, 1992)

Judgment and Order
of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 0847 (WK)

ROYSWORTH D. GRANT and WILLIE ELLIS, on behalf of themselves and all others similarly situated,

Plaintiffs,

LOUIS MARTINEZ,

Plaintiff-Intervenor,

—against—

THE BETHLEHEM STEEL CORP., et al.,

Defendants.

JUDGMENT AND ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to the Report and Recommendation of Magistrate Judge Leonard Bernikow dated June 18, 1991, and this Court's Memorandum and Order dated February 4, 1992, that defendants, individually and severally, are ordered to pay to the plaintiff class for their reasonable attorneys fees and expenses in this matter the following amounts, with the attorneys to be compensated in accordance with the chart found on page 42 of the June 18, 1991 Report and Recommendation and in accordance with the accompanying Stipulation and Order of today's date:

Attorneys' Fees Awarded pursuant to
Report and Recommendation;

Attorneys fees	$491,668.70
Costs and expenses	7,253.64

Attorneys Fees and expenses for Defending
Report and Recommendation:

Attorneys fees	$13,596.18
Costs and expenses	71.50

Total: $512,590.02

It is further ordered that the Defendants pay plaintiff Willie Ellis $753.60 in costs.

SO ORDERED

/s/ WHITMAN KNAPP

UNITED STATES DISTRICT COURT

DATED: February 21, 1992
New York, N.Y.

THIS DOCUMENT WAS ENTERED
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APPENDIX C

Grant v. Bethlehem Steel Corp.,
No. 76 Civ. 0847 (WK)
(S.D.N.Y. Feb. 4, 1992)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROYSWORTH E. GRANT and WILLIE ELLIS,
On Behalf of Themselves and All Others Similarly Situated,
Plaintiffs,

-against-

BETHLEHEM STEEL CORP., et al.,
Defendants.

MEMORANDUM AND ORDER
76 Civ. 847 (WK)

WHITMAN KNAPP, D.J.

This action has been pending since February 20, 1976, and has had an extraordinary history. For example, we have entered a plethora of Memoranda and Opinions responding to a multitude of motions and other legal proceedings, including those filed on: July 6, 1976; July 28, 1976; January 12, 1977; July 20, 1977; November 11, 1977; December 23, 1977; March 6, 1978; June 28, 1978; December 27, 1978; February 26, 1979; February 28, 1978; May 10, 1979; August 10, 1979; September 19, 1980; December 3, 1981; October 27, 1982, October 17, 1983; November 26, 1984; March 14, 1985; July 24, 1986; October 24, 1988; and, of course, this instant Memorandum and Order. The Second Circuit has ruled on appeals from our December 27, 1978 order dismissing the complaint, *Grant v. Bethlehem Steel*

Corp. (1980) 635 F.2d 1007 (reversed and remanded), and our June 17, 1985 order adopting Magistrate Judge Bernikow's Report and Recommendation that a settlement be approved, *Grant v. Bethlehem Steel Corp.* (1987) 823 F.2d 20 (affirming our denial of plaintiffs' request for consideration). And, needless to say, Magistrate Judge Leonard Bernikow has made innumerable rulings in the more than ten years he has overseen the proceedings.

We are now faced with the problem of the appropriate award of attorney's fees generated by the foregoing.

We are presented with an extraordinarily thoughtful and complete Report and Recommendation by Magistrate Judge Bernikow dated June 18, 1991, and by a most professional and imaginative memorandum in opposition dated September 23, 1991. Upon careful consideration of the foregoing documents, we adopt as our own Magistrate Judge Bernikow's findings of fact, conclusions of law, and recommendations.

Ordinarily, our review of such a report is governed by separate standards: we must give *de novo* review to the conclusions of law, but should accept findings of fact unless they are clearly erroneous. These distinctions are here irrelevant. We find that Magistrate Judge Bernikow's carefully thoughtout legal analysis is not susceptible to reasonable challenge, and that his finding of fact are clearly correct.

We therefore direct that plaintiffs be awarded $491,668.70 in fees and $7,253.64 in costs, for a total of $498,922.34—the lawyers to be compensated in accordance

with the chart found on page 42 of the Magistrate Judge's Report—and that Ellis be awarded $753.60 in costs.[1]

SO ORDERED.

New York, New York
February 4, 1992

/s/ WHITMAN KNAPP

WHITMAN KNAPP, U.S.D.J.

[1] Magistrate Judge Bernikow noted that "Bethlehem contends that plaintiffs have made certain errors in addition" and recommended that both sides agree on the addition before an order is entered. Report at 42. He nonetheless accepted plaintiffs' arithmetic in calculating the fee awards that we have here directed. As no party has mentioned this particular disagreement in papers submitted to us. we assume that it no longer exists. If this assumption is incorrect, any party may so advised us within 10 days of the entry of this order.

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APPENDIX D

Grant v. Bethlehem Steel Corp.,
No. 76 Civ. 0847 (WK)
(S.D.N.Y. June 18, 1991)

Report & Recommendation
of the Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROYSWORTH D. GRANT and WILLIE ELLIS,
On Behalf of Themselves and All
Others Similarly Situated,

Plaintiffs,

LOUIS MARTINEZ,

Plaintiff-Intervenor,

-against-

BETHLEHEM STEEL CORPORATION, et al.,

Defendants.

REPORT AND RECOMMENDATION

76 Civ. 0847 (WK)

TO THE HONORABLE WHITMAN KNAPP, U.S.D.J.:

Plaintiffs[1] §2000e-5(k) of Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. § et seq. ("Title VII"), and 42 U.S.C. § 1988, totalling $626,852.94, from Bethlehem Steel Corp. ("Bethlehem"). This figure represents, in addition to costs of $7253.64, the services of Richard A. Levy of Eisner & Levy, Michael D. Ratner of the Center for

[1] "Plaintiffs" refers to the class; "named plaintiffs" refers to Grant, Ellis and Martinez.

Constitutional Rights during his work on this suit and now a private practitioner, Lewis M. Steel of Steel & Bellman P.,C., the three attorneys who represented the class; various associates and paralegals at Eisner & Levy and Steel & Bellman; and Leon Friedman, who prepared the fee petition. Willie Ellis ("Ellis"), one of the named plaintiffs in this action, has submitted a separate application for fees and expenses totalling $12,323.60. These applications were referred to me for report and recommendation. *See* 28 U.S.C. §636(b) (1) (B).

Background

The facts of this case are fully reported in two Second Circuit opinions. *See Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981); *Grant v. Bethlehem, Steel Corp.*, 823 F.2d 20 (2d Cir. 1987). I review here only those aspects of the case necessary to decide the fee application.

This protracted class action litigation began when plaintiffs filed a complaint in this court on February 20, 1976. They alleged that Bethlehem and various of its employees violated their rights under Title VII and 42 U.S.C. §1981 by discriminating against blacks and Hispanics in their selection of iron work foremen.[2] Specifically, plaintiffs challenged

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[2] The complaint also alleged that Local 40 of the International Association of Bridge Structural and Ornamental Ironworkers ("Local 40) discriminated against plaintiffs. The complaint was amended to allege that the union retaliated against the same plaintiffs for initiating suit. Those claims against Local 40 were severed in October 1977. The named plaintiffs succeeded on their retaliation claims, and counsel negotiated and received a fee award from the union.

Bethlehem's word-of-mouth selection practices, and sought injunctive and monetary relief.[3]

On October 20, 1977, Bethlehem offered to settle for $40,000 for the entire class plus attorneys fees and costs and served a formal offer of judgment, pursuant to Fed. R. Civ. P. 68.[4] Plaintiffs rejected the offer of settlement and moved to have the offer of judgment stricken. On October 28, 1977, plaintiffs' motion was denied without prejudice to their right to renew.

In 1978, the case was tried in an eight-day bench trial before Judge Knapp. In an unpublished opinion filed January 2, 1979, Judge Knapp dismissed the complaint, holding that plaintiffs had failed to prove a prima facie case of discrimination. Defendants then requested that the court order plaintiffs to pay its post-offer costs in accordance with Rule 68. Plaintiffs renewed their motion to strike the offer of judgment, and Judge Knapp granted their motion.

Plaintiffs appealed the dismissal of their complaint to the Second Circuit, which held that plaintiffs had made out a

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[3] The complaint sought an order enjoining Bethlehem from discriminating against plaintiffs, directing it to undertake such affirmative action as would insure full employment opportunities, including the opportunity to be hired into supervisory positions, and awarding compensatory and punitive damages.

[4] Rule 68 provides in pertinent part:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued . . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer . . . .

prima facie case of both discriminatory impact and discriminatory treatment. *Grant v. Bethlehem Steel Corp.*, 635 F.2d at 1017-18. The Second Circuit remanded to allow defendants to introduce evidence that their discriminatory conduct may have been justified by business necessity and for any rebuttal testimony by plaintiffs. Defendants appealed to the Supreme Court, which denied the petition for a writ of certiorari on June 1, 1981. 452 U.S. 940 (1981)

On remand, Judge Knapp directed me to explore settlement. On May 21, 1982, Bethlehem served another offer of judgment, for $60,000 plus attorneys's fees and costs. Plaintiffs moved to have the offer stricken but then accepted the offer four months later, by letter dated September 21, 1982. Bethlehem informed plaintiffs that the offer had expired because it was not accepted within ten days of service and that it would therefore treat the September 21 letter as a counteroffer to settle for $60,000 plus fees and costs. In October 1982, Bethlehem and class counsel reached a settlement, and plaintiffs' motion to strike was deemed withdrawn. *See* Order of Judge Knapp, October 27, 1982. The settlement provided for monetary relief only, $60,000 for the entire class plus attorneys' fees to be determined by the court.

The named plaintiffs objected to the settlement and moved to discharge counsels. In April 1983 the attorneys were removed as counsel for the named plaintiffs, who thereafter, except for a brief period, appear pro se. But the named plaintiffs' motion supported by other class members, to remove the attorneys as counsel for the class was denied. In recommending denying the named plaintiffs' motion, I explained that no new counsel had appeared, and if new counsel did take the case "an enormous amount of time would be needed to become familiar with issues to adequately

represent the class. As significant, the attorneys have represented the class skillfully and effectively from the inception of the case to the present." Report and Recommendation, November 1, 1984 at 3. The attorneys have continued to represent the class.

After a fairness hearing held in 1985, I recommended approval of the settlement over the objection of 45 members of the class. Although when the court certified the class in 1977 some form of injunctive relief was plausible,[5] that was no longer the case. As I wrote in my Report and Recommendation of June 27, 1986 at 12: "[I]njunctive relief . . . . is problematical because Bethlehem is no longer in the structural steel business.[6] Moreover, the increasingly lengthy passage of time in this case would appear to call into question the appropriateness of retraining or other similar additional remedy." I therefore concluded that the settlement provided the class most, if not all, of their potential recovery. By order dated July 24, 1986, Judge Knapp approved the settlement. The named plaintiffs appealed that order, but the Second Circuit affirmed on June 30, 1987. *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20. The case was again referred to me, to determine eligibility and formulate a distribution plan. Class counsel submitted a proposal, which the named plaintiffs and other class members objected to. At the final hearing, however, all class members present expressed approval of the plan, under which sixteen class members shared the award, and on October 5, 1988, I recommended the court confirm class counsel's plan. On October 24, 1988,

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[5] In certifying the class, Judge Knapp wrote: "it may be perfectly feasible to require Bethlehem to participate in—or finance—a training program for minority structural steel workers who wish promotion." Memorandum and Order, January 12, 1977 at 4.

[6] Bethlehem had shut down its structural steel operations in 1977.

the district court adopted my recommendation and invited class counsel to file a fee application. Plaintiffs filed the instant application in December 1989.

Bethlehem raises several objections to plaintiff's fee application. It contends that counsel is seeking fees on its own behalf but does not have standing to do so, that the fee award should not exceed the amount of the settlement, and that plaintiffs may not recover for work performed after its offers of judgment. Bethlehem also disputes plaintiffs' inclusion of hours expended on certain tasks, the market rates plaintiffs use for partners and associates, and the use of current rather than historical rates. It also argues that the fee award should be reduced because of plaintiffs' limited success.

Discussion

Under 42 U.S.C. §2000e-5(k), the court may, in its discretion, award the prevailing party a reasonable attorney's fee. Similarly, 42 U.S.C. §1988 provides for a fee award to the prevailing party in a §1981 action.[7] Bethlehem does not dispute that plaintiffs are prevailing parties for the purposes of these fee-shifting statutes, even though the dispute was resolved by settlement. *See Maher v. Gagne*, 448 U.S. 122, 129 (1980) (party's prevailing through settlement does not preclude attorney's fee award).

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[7] The same standards apply to the various federal fee-shifting statutes that provides for awards made to a "prevailing party." *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); *Chambless v. Masters, Mates and Pilots Pension Plan*, 885 F.2d 1053, 1058 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2587 (1990). I therefore cite cases interpreting fee awards under Title VII and §1988 interchangeably.

A prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley v. Eckerhart,* 461 U.S. at 429, quoting S. Rep. No 94-1011, 94th Cong. 2d sess. 4, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5098, 5912; *see also Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). As an initial matter, however, Bethlehem argues that the fee application should be denied in its entirety. The right to seek fees, it says, belongs to the prevailing party, not to attorneys for the prevailing party. The fee application, contends Bethlehem, is an "application by class counsel acting independently of plaintiffs or any member of the class." Memo in Opposition at 17.

It is well-settled that the right to seek attorney's fees under the statutes at issue belongs to the party. *See Venegas v. Mitchell,* _ U.S. _, 110 S. Ct. 1679, 1682 (1990); *Evans v. Jeff D.*, 475 U.S. 717, 730 (1986). The application was submitted, however on behalf of the class, not in the names of the attorneys.[8] Furthermore, no member of the plaintiff class, including the named plaintiffs whom the attorneys no longer represent,[9] has submitted papers in opposition to the

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[8] The cases Bethlehem cites in which fees were denied when the application was brought in the attorney's own name are therefore inapposite. *See Soliman v. Ebasco Services Inc.*, 822 F.2d 320, 323 (2d Cir. 1987), *cert. denied,* 484 U.S. 1020 (1988); *Brown v. General Motors Corp.*, 722 F.2d 1009, 1001 (2d Cir. 1983); *Oguachuba v. I.N.S.*, 706 F.2d 93, 96 (2d Cir. 1983). In those cases, moreover, although the Second Circuit used strong language to the effect that fee applications may not be brought in the attorney's name, the applications were not denied on that ground alone.

[9] Attorney's fees may, of course, be awarded when counsel has withdrawn or been dismissed. *See Mayberry v. Walters,* 862 F.2d 1040, 1043 (3d Cir. 1988); *Hutchison v. Wells,* 719 F. Supp. 1435, 1448 (S.D.Ind. 1989); *Fluhr v. Roberts,* 463 F. Supp. 745 (W.D. Ky. 1979).

application. *Compare Soliman*, 822 F.2d at 323 (where party submitted affidavit that she did not authorize attorney to appeal denial of attorney's fees, attorney had no independent standing to bring the appeal).

One named plaintiff has written to the court indicating he wants to add his expenses to those submitted by the attorneys, not to contest them.[10] Moreover, the case do not require a party to submit an affidavit joining in his own motion, particularly in a class action, where absent class members are not required to authorize the class representatives to commence or maintain the action and do not occupy any direct attorney-client relationship with class counsel. H. Newberg, 3 Newberg on Class Actions §1402 at 185 (2d ed. 1985). Nevertheless, in response to Bethlehem's Memorandum in Opposition, one member of the class has submitted such an affidavit. *See* Aff. of Mervin Beatty, attached to Reply Aff. of Richard Levy. Bethlehem, however, maintains that because a majority of the sixteen class members found eligible to share the settlement submitted affidavits in 1982 in support of the named plaintiffs' motion to remove the attorneys as class counsel, all members of the class now oppose the fee application. As there is no evidence that the application is unauthorized and it has been brought in plaintiffs' name, I see no reason to deny plaintiffs the attorneys' fees that inure to counsel.

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[10] The letter of Willie Ellis, November 6, 1988, states: "Please order Mr. Levy once again to send me the copies of his proposed entitlement for legal fees and expenses in this case so I may add my itemized expense list for reimbursement." (emphasis omitted). Bethlehem interprets Ellis's letter as evidence "highlight[ing] the fact that class counsel cannot be construed as representing 'plaintiffs.'" Memo in Opposition at 18. That Ellis incurred expenses after class counsel was removed as counsel for the named plaintiffs merely highlights that class counsel did not at that time represent Ellis.

1. *Lodestar determination*

To determine the amount of an attorney's fee award, a lodestar figure is set by "multiplying the hours spent on a case by a reasonable hourly rate of compensation for each attorney involved." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 553 (1986). Plaintiffs bear the burden of establishing entitlement to the award and documenting the appropriate hours expended and hourly rates. *Hensley v. Eckerhart*, 461 U.S. at 437. Although the lodestar figure may be adjusted upward or downward, there is "[a] strong presumption that the lodestar figure . . . represents a 'reasonable' fee." *Delaware Valley*, 478 U.S. at 565.

a. Hours

Counsel is entitled to compensation only for time "reasonably" expended and must "make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary." *Hensley*, 461 U.S. at 434. *Hensley* also requires attorneys to use "billing judgment"; hours that would not properly be billed to a client are not properly billed to an adversary. *Id.* Plaintiffs' fee application apparently seeks compensation for every hour expended on this litigation, for a total of more than 2,700. I have no reason to question counsel's efficiency or good faith, but in no litigation is every hour expended necessary. It does not appear that the attorneys, who are in the best position to make this judgment, have made any attempt to exclude hours expended unnecessarily or on ministerial work. *Compare New York State National Organization for Women v. Terry*, 737 F. Supp. 1350, 1359-60 & 1360 n.4 (S.D.N.Y. 1990) amount of time submitted fully allowed where attorneys indicated they used billing judgment to eliminate duplicative

or unnecessary hours and time spent on administrative tasks); *Pierce v. J.R. Tripler & Co., Inc.*, 1991 WL 45060 *3 (S.D.N.Y. March 25, 1991) making only minor reductions where fees requested already reflected reduction for duplication of effort). Counsel are experienced litigators; on the one hand, they are unlikely to do unnecessary work but, on the other, any ministerial or duplicative work is likely to be expensive. I therefore recommend, except for work on the fee application, an across-the-board reduction of 10%. *See New York Ass'n for Retarded Children v. Carey,* 711 F.2d 1136, 1146 (2d Cir. 1983 (endorsing percentage cuts as a means of trimming excessive or duplicative hours from fee application). For work on the fee application, I recommend a 5% reduction in Friedman's hours, on the same rationale and assuming no duplication, but a 30% reduction for the work of the other attorneys; a good part of their time was spent as client to Friedman, not as attorneys. *See White v. City of Richmond,* 559 F. Supp. 127, 131 (N.D. Cal. 1982), *aff'd* 713 F.2d 458 (9th Cir. 1983). These cuts are in addition to the reductions discussed below.

(1) Bethlehem's objections to the hours expended after its offers of judgment

Bethlehem argues that counsel should not recover fees for hours expended after its offer of judgment in 1977, contending that because it had terminated its structural steel operation counsel knew that only monetary relief was available. "Armed with the knowledge, in the earliest phases of this litigation, that the only available relief would be monetary damages, plaintiffs and their counsel used poor judgment in rejecting Bethlehem's offer to settle the action in 1977 for $40,000." Memorandum in Opposition at 11. Therefore,

Bethlehem argues, an award of fees incurred after 1977 would compensate for hours unreasonably expended.[11]

Of course, $60,000 is more than $40,000, and therefore plaintiffs ultimately obtained more than the 1977 offer.[12] In addition, plaintiffs pointed out that Judge Knapp, in his memorandum and order certifying the class, recognized in 1977 that plaintiffs could be awarded nonmonetary relief in 1977. See memorandum and Order, January 12, 1977 at 4 ("it may be perfectly feasible to require Bethlehem to participate in - or finance - a training program for minority structural steel workers who wish promotion"). Further, Judge Knapp granted plaintiffs' motion to strike the offer of judgment partly because plaintiffs' counsel did not have enough information from Bethlehem to evaluate the offer so that they could recommend its acceptance to the class. Consequently, plaintiffs were not unreasonable in rejecting

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[11] Bethlehem finds support for this contention in Judge Knapp's comment in his dismissal of the action that the suit would "in all probability" have been settled by a consent decree were Bethlehem still employing ironworkers, as well as in counsel's arguments for upholding the settlement and in my 1985 report recommending approval of the settlement in which I stated injunctive relief was problematical. For the reasons discussed in the text, these remarks do not bear on the reasonableness of accepting an offer made years before.

[12] Bethlehem argues that because of the time value of money, the rejected $40,000 settlement offer made in 1977 was worth more than the $60,000 plaintiff ultimately obtained. Bethlehem also acknowledges that there is no authority for considering the time value of money in determining the value of settlement offers, and it has not persuaded me that this is an appropriate case to make new law. I consider $40,000 significantly less than $60,000 and therefore also reject Bethlehem's reliance on *Huertas v. East River Housing Corp.*, 662 F. Supp. 282, 286 (S.D.N.Y. 1986), *vacated on other grounds*, 813 F.2d 580 (2d Cir. 1987), on remand, 674 F. Supp. 440 (S.D.N.Y. 1987), which did not permit an award of fees in the three-year period after plaintiffs rejected a settlement offer "substantially similar" to one finally accepted.

the 1977 offer and therefore the hours expended after the offer of judgment were not unreasonably expended.[13] Finally, even if in hindsight the rejection could be termed unreasonable,

> A rule giving trial judge discretion to deny . . . fees where the refusal of an offer is shown after the fact to have been unwise might well lead to very uneven results and even misuse in cases in which judges become involved in settlement negotiations. It may be that our legal system badly needs a mechanism to encourage early settlement, but that mechanism ought to emerge either from the rule-making process or directly from Congress.

Cowan v. Prudential Insurance Co., 728 F. Supp. 87, 92 (D. Conn. 1990) *rev'd on other grounds*, No. 90-7865 (2d Cir., June 12, 1991). *See also Wooldridge v. Marlene Indus. Corp.*, 898 F.2d 1169, 1177 (6th Cir. 1990) ("the question is not whether . . . in hindsight the time expenditure was strictly necessary to obtain the relief achieved. Rather, the standard is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit to success at the point in time when the work was performed.").

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[13] This situation is not unlike that in *In re Agent Orange Product Liability Litig.*, 611 F.Supp. 1296 (E.D.N.Y. 1986), *aff'd in part, rev'd in part*, 818 F.2d 226 (2d Cir. 1987), where at the outset "it appeared that there might be some basis for believing that the herbicide . . . had caused widespread damage to Vietnam veterans and perhaps, to their families," but discovery revealed a lack of a factual basis. 611 F.Supp. at 1304. The court found that the attorneys' work yielded a significant benefit to the class despite the relative smallness of the individual relief the settlement afforded. *Id.* Under the circumstances, the court found "untenable" the suggestion that the attorneys were not entitled to fees. *Id.*

Bethlehem also contends that plaintiffs cannot recover fees for services performed after its $60,000 offer judgment in May 1982. By settling the action in October 1982 for the amount of the May offer of judgment, Bethlehem says, plaintiffs obtained an amount equal to, but not more favorable than, the offer. Under bethlehem's interpretation of Rule 68, plaintiffs are therefore barred from recovering fees incurred after May 1982.

Bethlehem's argument must fail; no authority holds that Rule 68 applies to a case resolved by settlement.[14] Bethlehem cites *Marek v. Chesney*, 473 U.S. 1 (1985). But the Supreme Court in that case wrote that under Rule 68, "[c]ivil rights plaintiffs . . . who reject an offer more favorable than what is thereafter recovered *at trial* will not recover attorney's fees for services performed after the offer is rejected." *Marek v. Chesney*, 473 U.S. 1, 10 (1985) (emphasis added).

Two cases have considered whether Rule 68 applies when a case is resolved by settlement rather than by the entry of judgment after trial; both held that it does not apply. *See*

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[14] Bethlehem argues that *Boorstein v. City of New York*, 107 F.R.D. 31, 33 (S.D.N.Y. 1985), "held that Rule 68 precludes a plaintiff from recovering postoffer fees and costs when an action ends by way of a settlement which is not more favorable than an earlier offer of judgment." Memo in Opposition at 46. That case, however, did not involve the issue of whether Rule 68 applies to a dispute resolved by settlement. The language Bethlehem seems to rely on is dicta where the court in general language, which it did not apply to any facts, states: "If the judgment or settlement ultimately obtained by plaintiff is less than the Rule 68 offer, plaintiff cannot recover attorneys fees or costs from the date the offer was made to the end of the suit." *Id.* at 33. Nonetheless, were I to apply this statement of Rule 68, I would have to reject Bethlehem's argument, because the $60,000 settlement is not "less than" the Rule 68 $60,000 offer.

EEOC v. Hamilton Standard Division, 637 F. Supp. 1155, 1158 (D. Conn. 1986) ("court has found no authority for the proposition that the offer of judgment provisions of Rule 68 . . . apply to cases that end in settlement"); *Hutchison v. Wells*, 719 F. Supp. 1435, 1443-44 (S.D. Ind. 1989) (Rule 68 forces plaintiff to choose between settling now and settling later). Bethlehem argues that these cases are not persuasive. The refusal to apply Rule 68 to cases resolved by settlement, it contends, creates a disincentive to enter into early settlements, and applying Rule 68 to this case would be consistent with *Marek v. Chesney*.

To adopt Bethlehem's construction of the rule, though, would create an incentive to go to trial if an initial offer is not accepted, which would contravene the rule's purpose of encouraging settlements by prompting the parties to balance the risks and costs of litigation "against the likelihood of success *upon trial* of the merits." *Marek v. Chesney*, 474 U.S. at 5 (emphasis added). As the *Hutchison* court, in rejecting a similar argument, stated:

> [I]t would provide a disincentive for attorneys to accept settlements once an initial settlement was rejected. It would also discourage careful consideration of such offers. The defendants' reading would require plaintiffs to precipitately accept a settlement offer for fear that he may be foreclosed from accepting a subsequent offer because his interim efforts would not be compensable. This would permit defendants to drive a wedge between the interests of the plaintiff and his lawyer. Congress recognized that the availability of attorneys' fees was necessary to attract competent counsel to civil rights claims. It is also well recognized that attorneys may not be willing to take on civil rights claim without the promise of an award under section 1988. Thus forcing a civil rights attorney to

choose between compensation and his client's interest in settling thwarts the congressional purpose underlying section 1988.

719 F. Supp. at 1443 (citations omitted).

(2) Bethlehem's objections to specific hours claimed

(a) Work relating to claims against Local 40

Bethlehem contends that it should not be required to compensate for hours spent on certain tasks. First, it states that it should not have to pay for 39.15 hours (Levy 27.15, Ratner 12) spent for work relating to claims against Local 40. These hours were expended in, among other things, amending the complaint to allege that the union retaliated against the named plaintiffs. Since these hours are severable and the attorney's fee on the retaliation claim has been separately negotiated, they should be excluded. Therefore I recommend reducing Levy's hours by 27.15 and Ratner's by 12.

(b) Vague recordkeeping

Bethlehem seeks to exclude certain hours because the records are impermissibly vague. Time records are sufficiently detailed if they identify the "general subject matter" of time expenditures. *Hensley v. Eckerhart*, 461 U.S. at 437 n.12. Those who apply for fees for work after the date of *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1148 (2d Cir. 1983), must document the application with contemporaneous time records that specify for each attorney "the date, the hours expended and the nature of the work performed." *Id.* at 1148. Reconstructed records are permissible for work performed before *Carey*. *Id.* at 1147.

With two exceptions, the records Bethlehem challenges are sufficiently detailed under *Carey* and *Hensley* to allow the court to evaluate the nature and reasonableness of the time expended. First, 11 hours claimed for paralegal Julie Brill are labelled "no description." I recommend compensating for the three hours of April 19, 1983, because Levy's time sheet refers to Brill's research on that date, but I recommend eliminating the other 8 hours.

Second, Levy and Ratner have submitted the lump-sum figures of 150 and 80 hours, respectively, to cover the period from January 26, 1978, to April 15, 1978, for work that culminated in the 116-page post-trial brief.[15] Bethlehem argues that this recordkeeping is not accurate enough, even for work performed before Carey, to permit the court to evaluate whether the time spent was excessive, redundant, or unnecessary. In his Reply Affidavit, Levy states that this work included extensive analysis of a long trial transcript, review of trial exhibits and other materials including voluminous deposition testimony, and research in support of seven legal arguments in addition to drafting, editing, and rewriting the brief. He states he is certain he underestimated his time, which was probable more accurately 200 to 250 hours.

Reconstructed records should be sufficiently accurate to enable the court to evaluate the reasonableness of the time expended. *Williamsburg Fair Housing Committee v. Ross-Rodney Housing Corp.*, 599 F. Supp. 509, 517 (S.D.N.Y.

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[15] Levy's entry, preceded by the date 1/26/78 to 4/15/78, reads:

Extensive research, review of trial transcript, extensive discussions on possible rebuttal case, many meetings among counsel drafting, re-writing, editing, finalizing, post-trial brief.

Exh. 4 to Plaintiff's Application for Attorney's Fees at 9.

1984). Even when an attorney supplies no breakdown of his hours and no precise description of his activities, the court may, based on its knowledge of the files and observation of the attorney, allow for the work done by him. *See In re Agent Orange,* 611 F. Supp. at 1335 (200 hours allowed in absence of precise records). The number of hours Levy and Ratner claim in order to have performed this work does not appear unreasonable; the time Steel claimed for this period, between 60 to 70 hours, is clearly inadequate to have accomplished the necessary analysis, research, and writing. however, "ambiguities arising out of poor time records should be resolved against the applicant." *Chrapliwy v. Uniroyal,* 583 F. Supp. 40, 47 (N.D. Ind. 1983). Therefore, I recommend a reduction of 10%, eliminating 15 hours from Levy's claimed time on this phase and 8 hours from Ratner's. *See United States Football League v. National Football League,* 704 F. Supp. 474, 477 (S.D.N.Y. 1989) (reducing ultimate award 10% where court cannot ascertain whether vague entries are properly recoverable), *aff'd,* 887 F.2d 408 (2d Cir. 1989).

(c) Duplicative, unnecessary, or excessive hours

Bethlehem seeks a reduction in 1126.81 hours that it terms duplicative, unnecessary or excessive: 68.4 hours billed to preparation of an unsuccessful preliminary injunction motion[16]; 23.25 hours billed to preparing for and attending a five-hour deposition of E. Richard Driggers; 17.83 hours billed to preparing for and attending the deposition of James Deavers; 351.15 hours billed to preparing for and attending trial; 350.35 hours billed to posttrial briefing; and 235.85

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[16] In his supplemental affidavit, Levy claims 8.5 additional hours of work on the preliminary injunction, bringing the total to 76.9 hours.

billed to appeal from the order dismissing the action. Bethlehem argues for a reduction of these hours because two or three attorneys performed these tasks, contending the case was overstaffed. It requests a 50% reduction in the hours spent in the trial, posttrial and appeal phases or that Steel and Ratner be compensated at substantially lower rates than Levy.

The lion's share of these hours are not duplicative, unnecessary or excessive on their face. "The retaining of multiple attorneys in a ... lengthy employment discrimination case ... is understandable and not a grounds for reducing the hours claimed." *Lenihan v. City of New York*, 640 F. Supp. 822, 825 (S.D.N.Y. 1986), quoting *Johnson v. University College of the University of Alabama*, 706 F.2d 1205, 1208 (11th Cir.), *cert. denied*, 464 U.S. 994 (1983). It is not unreasonable for two or three attorneys to represent plaintiffs at a deposition or at trial; indeed, "division of responsibility may make it necessary." *Ross-Rodney*, 599 F. Supp. at 518. In light of the complexity of this class action litigation, which has been twice to the Second Circuit, plaintiffs' use of several attorneys was appropriate. *See New York Ass'n v. Carey*, 711 F.2d at 1146. Nevertheless, I recommend reducing as unnecessary to plaintiffs' ultimate success the time spent on the unsuccessful preliminary injunction motion. As plaintiffs states that the research and fact-gathering performed for the motion eliminated the need to do the same research and fact gathering later, I recommend cutting in half the number of hours, i.e., subtracting 34 hours from Levy's time and 4.62 from Steel's.

To the extent that any other hours were duplicative or unnecessary, I have accounted for that in the overall 10% reduction. As for Bethlehem's suggestion to reduce the rates of two attorneys on the trial through appeal phases, that

would contravene the mandate to determine fee awards based on "prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1986); *Miele v. New York State Teamsters Conference Pension & Retirement Fund*, 831 F.2d 407, 409-10 (2d Cir. 1987) (error to set rate by considering factors other than rates charged by comparable lawyers at private bar).

(d) Hours expended after certiorari was denied

Bethlehem seeks to exclude "time spent by class counsel fighting with class members." Memo in Opposition at 55. From June 1981, when the Supreme Court denied certiorari, to 1987, when the Second Circuit affirmed the settlement, Bethlehem estimates that class counsel expended 354.9 hours in lawyer time and 47.7 hours in paralegal time,[17] to resolve disagreements with the class about the fairness of the settlement and the adequacy of class counsel's representation. Bethlehem concedes that, because this was a class action, some time was necessary to approve and distribute the settlement, but contends that these hours were excessive and did not contribute to the ultimate settlement.

The hours spent opposing the named plaintiffs' motion to dismiss counsel are not chargeable to Bethlehem, since that is essentially a problem of client relations. *See Soba v. McGoey*, __ F. Supp. __, 1991 WL 53856 *4 (S.D.N.Y. March 29, 1991) (internal memorandum on ethical issues and

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[17] Bethlehem seems to have arrived at this figure by including nearly all the hours expended by counsel after the denial of certiorari, even though the work during this period included negotiating the settlement with Bethlehem, preparing the order of settlement, and determining the distribution formula.

on continuing to represent client not compensable). I estimate the time spent on this matter at 50 hours, which apparently includes the 11 hours spent by Harry Franklin, an associate; the other 39 hours I deem expended by partners and accordingly deduct 19.5 hours each from Levy's and Steel's time.[18]

Plaintiff, however, may recover fully for the time spent defending the settlement agreement against the various class members' objections. Rule 23(e) provides that a class action shall not be compromised without approval of the court. The court must consider objectors' views to evaluate the fairness of a settlement. Counsel's advocacy of the settlement in the face of the objections facilitated the court's determination. I reject Bethlehem's argument that class members objected because counsel had not effectively explained the relief available to them and therefore counsel does not deserve fees. Their clients' misperceptions should not reduce counsel's efforts. *See Soba v. McGoey*, 1991 WL 53856 *6 (counsel not penalized when plaintiff misperceived true defendants). The alternative to counsel's effective advocacy would have been further settlement negotiations or trial, either of which would likely have required considerable resources. Given Bethlehem's intention, as evident from its Outline of Proposed Further Proof Upon Remand, to relitigate every issue on liability, further litigation would have been "complex, costly, and time consuming." *Grant v. Bethlehem Steel Corp.*, 823 F.2d at 24, quoting Report and Recommendation, June 27, 1986.

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[18] Ratner does not claim hours after 1980.

(e) Miscellaneous

Finally, Bethlehem states that certain work, including some work on the fee petition performed by attorneys other than Friedman, was ministerial and is compensable, if at all, at paralegal rates. To the extent that any work was ministerial, that has been accounted for in the overall 10% reduction of hours and the 30% reduction for work on the fee petition.

b. Rates

The rate awarded is determined by "the prevailing market rates in the relevant community" for "similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson,* 465 U.S. at 895-96 & n.11. The "relevant community" is the district in which the district court sits. *Polk v. New York State Dep't of Corr. Services,* 722 F.2d 23, 25 (2d Cir. 1983). The proper rate is that charged to private clients. *Miele v. New York State Teamsters Conference on Pension & Retirement Fund,* 831 F.2d at 409.

Plaintiffs seek the following hourly rates, of between $225 and $240 for partners, between $125 and $165 for associates, and $250 for Friedman:

Steel,	$240/hour
Ratner,	225
Levy,	165
Ritz,	125
Behroozi,	125
Franklyn,	125
Fine,	125
Pollack,	125
Paralegals,	123
Friedman	250

The fee applicant bears the burden of establishing a reasonable rate. *Hensley v. Eckerhart,* 461 U.S. at 433. In support of their claim that these figures represent the current prevailing market rates for attorneys in the New York City area, the attorneys assert by affidavit that they currently charge fee-paying clients these rates, and submit affidavits of other practitioners that these rates are reasonable . Another source of information on proper fees are awards in other, similar cases. Plaintiffs cite several cases awarding fees of $200 to $250. Of particular relevance are the recent case of *Huntington Branch NAACP v. Town of Huntington,* 749 F. Supp. 62 (E.D.N.Y. 1990), *amended,* __ F. Supp. _, 1991 WL 69443 (E.D.N.Y. April 29, 1991), where Judge Glasser awarded Steel and Friedman $225/hour for work done in the Eastern District of New York,- 749 F. Supp. at 65, 68, and Judge Knapp's opinion in *Pierce v. Tripler,* 1991 WL 45060 (S.D.N.Y. March 25, 1991), which awarded partners in an employment discrimination case/ $200/hour and a senior partner $300/hour for 3 hours' work.[19] *Huntington* found

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[19] Therefore, Bethlehem's objection that $225 and $240 "seem" high, in the absence of evidence to the contrary, should be rejected. Bethlehem also argues that Levy should be compensated at a junior partner level but

(continued on next page...)

appropriate a rate of $135/hour for associates with five and nine years' experience. 749 F. Supp. at 65. Judge Knapp used the associate rates awarded in *Huntington* as a benchmark in *Tripler,* awarding $135/hour to more experienced associates but considerably less experienced than the partners, and awarding less experiences associates $115/ hour.

These attorneys are all entitled to their market rates, but "[t]he amount awarded should not be the highest rate they can earn, but such rate as will provide, 'reasonable payment for the time and effort expended.'" *Huntington*, 749 F. Supp. at 65, quoting, *Delaware Valley,* 483 U.S. at 726. With *Huntington* and *Tripler* as guides, it is appropriate to award Levy, Steel, Ratner, and Friedman $225/hour;[20] to award Ritz, who graduated in 1983, $135/hour; to award Pollack, who is now a partner, the $125 requested; and to award the other, less experienced associates and those for whom no background information is supplied $115/hour.[21] Bethlehem does not contest the reasonableness of the paralegal rate; I recommend granting as a reasonable rate the $40/hour

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[19](...continued from preceeding page)
does not specify an appropriate rate or explain why Levy who graduated in 1968, should receive less than Ratner, who graduated in 1971.

[20] In a letter dated November 1, 1990, referring the court to *Huntington,* Friedman urged that the court not be tied to the $225 figure because that was awarded for work done in the Eastern District and rates in the Southern District are higher. I follow Judge Knapp's lead in not recommending a higher rate, noting that although in *Tripler* a senior partner was awarded a high fee of $300, that was for only 3 hours' work.

[21] Bethlehem disputes on various grounds the rate plaintiffs requested for Mitra Behroozi, an associate at Eisner & Levy who was admitted to the bar in 1987 and who worked on distributing the fund. The reduction of the rate awarded her to $115/hour obviates the need to discuss those grounds in any detail.

plaintiffs request. *See Tripler,* 1991 WL 45060 *2 (awarding $45/hour).

Bethlehem argues that the appropriate market rate is not the current rate but the rate changed when the work was performed ('historical rate'). In assigning a fee rate to the hours worked, it had been a practice in this circuit to follow *New York State Ass'n for Retarded Children v. Carey.* 711 F.2d 1136, 1153 (2d Cir. 1983), and divide multi-year litigation into two periods, applying the current rate to the most recent few years and a lesser rate to the earlier period. But the Supreme Court recently held, in *Missouri v. Jenkins,* 491 U.S. 274, 283-84 (1989), that some method should compensate for delay in receiving payment in a multi-year litigation and that using the current rate rather than the historical rate can appropriately adjust for the delay. The court noted: "If no compensation were provided for the delay in payment, the prospect of such hardship could well deter otherwise willing attorneys from accepting complex civil rights cases that might offer great benefit to society at large; this result would work to defeat Congress' purpose in enacting §1988 of 'encourag[ing] the enforcement of federal law through lawsuits filed by private persons.'" Id. at 283 n.11 (citation omitted).

Bethlehem correctly notes that *Missouri v. Jenkins* does not require courts to apply current rates to compensate for delay, and the two-step *Carey* approach has not been abandoned in this circuit, at least when the court considers the factor of delay to award "generous" historical rates. *See Chambless v. Masters,* 885 F.2d at 1060 (courts retain latitude in determining how they will compensate for delay); *Wilkinson v. Forst,* 729 F. Supp. 1416, 1418 (D. Conn. 1990) (using *Carey* approach and raising the historical rate by approximately 35%). Since *Missouri v. Jenkins,* however,

and a practice in this circuit before the decision, a trend has been to apply current rates to compensate for delay. *See, e.g., Soba v. McGoey,* 1991 WL 53586 *6 (current rates applied to six-year litigation); *Huntington Branch NAACP,* 749 F. Supp. 67 (seven-year litigation). *Cowan v. Prudential Ins. Co.,* 728 F. Supp. at 92 (nine-year litigation); In the instant case, counsel has received no compensation for a litigation that began in 1976; I find it appropriate that they be awarded current rates.

Bethlehem contends, however, that compensation for delay is not justified, because plaintiffs and their counsel caused the delay. The history of this litigation, though, shows that Bethlehem vigorously contested liability, including filing a petition for a writ of certiorari. After certiorari was denied, in 1981, as noted, Bethlehem indicated in its Proposed Further Proof Upon Remand that it would attempt to relitigate "every possible issue bearing on liability." Report and Recommendation, June 27, 1986 at 14. A defendant cannot litigate tenaciously and then "be heard to complain about the time necessarily spent by the plaintiff in response." *City of Riverside v. Rivera,* 477 U.S. 561, 580 n.11 (1986), quoting *Copeland v. Marshall,* 641 F.2d 880, 904 (D.D.C. 1980) (en banc). As plaintiffs point out, the time from settlement in 1982 to final approval by the Second Circuit in 1987 is hardly unusual in a class action. In the Agent Orange litigation, for example, the settlement was not final until four years after settlement was reached between the parties. The objectors had every right to object, and the time counsel speent defending the settlement benefited Bethlehem, since, as indicated, the alternative was a costly trial.

2. Proportionality between settlement amount and fee award

Bethlehem argues, relying on *City of Riverside v. Rivera*, 477 U.S. 561 (1986) 4-1-4 decision), that the fee award should not exceed the amount of the settlement, contending that the fees requested are so disproportionate as to be unreasonable under *Hensley*. In *Riverside*, the plurality of four justices, in upholding more than $245,000 in fees when damages awarded were only $33,350, rejected a proportionality rule in any factual context. Justice Powell concurred in the judgment based on the district court's factual findings, which indicated that police wrongdoing was institutionalized and that the suit vindicated the rights of the community even though no declaratory or injunctive relief had been ordered. Justice Powell indicated, however, that "primary consideration" must be give to the actual damages awarded compared to the damages sought when "private damages" are the principal purpose of the litigation. *Id.* at 585. The dissent argued for a rule of proportionality in most circumstances, reasoning that an attorney should not charge more than he would absent a potential fee award. *Id.* at 591.

Bethlehem interprets *Riverside* as requiring proportionality except in rare cases or special circumstances. As Bethlehem states its case: "Unless exceptional circumstances exist which cannot be quantified in monetary terms, the plaintiffs' lawyers' meter must be shut off when legal fees exceed the monetary relief requested." Memo in Opposition at 28. Recently, the Second Circuit rejected this interpretation of *Riverside*, and in doing so effectively rejected Bethlehem's arguments for reducing the fee award because of the size of the damage award. *Cowan v. Prudential Ins. Co.*, No. 90-7865 (2d Cir., June 12, 1991). The *Cowan* court read *Riverside* narrowly, as holding if plaintiffs win a lawsuit that

has public interest overtones and the district court's findings support the fee award, no proportionality between the fee and damages is required even where the fee awarded is eleven times the amount of damages recovered." *Id.*, slip op. at 11.

In Bethlehem's view, only if plaintiffs obtain injunctive relief or a case establishes a new principle has the litigation benefited a public interest that would justify a disproportionate fee award. Plaintiffs obtained only monetary relief, and Bethlehem discounts the Second Circuit opinion in this case as not particularly important because it "purported" to rely on settled principles of law. To the extent that there are any standards or methods by which a court could calculate the public interest served by a case and evaluate that interest in light of a disproportionate fee award, see *Cunningham v. City of McKeesport,* 807 F.2d 49, 54 (3d Cir.) (doubting whether any such standards exist and hesitant to create new standards without a mandate), *cert. denied,* 481 U.S. 1049 (1987), the "public interest" does not have the narrow definition Bethlehem urges. Justice Powell characterized *Riverside* as "hardly" involving a new ruling, *Riverside,* 477 U.S. at 586, and if the facts of *Cowan* justify a disproportionate fee award, the facts in this case do so as well.

In *Cowan,* a single supervisor had not considered a single employee's applications for promotions the employee was qualified for. The plaintiff received only monetary relief, but the Second Circuit found that "'the result achieved is necessarily more than mere financial gain,'" slip op. at 12 (citation omitted); the plaintiff's suit made other employees aware of a discriminatory supervisor and made the employer "aware that it has to exert greater efforts to protect its employees and society itself from future discriminatory behavior in its employment actions." *Id.* In this case, the "public interest overtones" are broader. Plaintiffs challenged Bethlehem's

word-of-mouth practice of hiring foremen, which the Second Circuit found had a disparate impact on qualified blacks and Hispanics sufficient to impose liability unless Bethlehem proved business necessity.[22] By definition, impact claims involve more than the isolated acts affecting a single individual in *Cowan*. Thus, Bethlehem's argument that the Second Circuit's opinion—finding that Bethlehem's promotion system "would allow Bethlehem to perpetuate impermissible the results of its earlier discrimination," *Grant*, 635 F.2d at 1018—does not benefit the public interest should be rejected. As in *Cowan*, this suit alerted Bethlehem that it had to "exert greater efforts to protect its employees and society itself," *Cowan*, slip op. at 12, from future discriminatory employment actions.

Finally, the *Cowan* court thought it unsound to introduce dichotomy between private damages cases and public interest cases in civil rights litigation:

> Courts should not become involved in the task of weighing the public benefit generated by civil rights cases. Such weighing is inherently a subjective process and injects and unseemly appearance of unfairness into the judicial determination of attorney's fees. The legislative history of § 1988 seems to indicate that congress did not want to differentiate between private remedies and public ones: "Congress expressly recognized that a plaintiff who obtains relief in a civil rights lawsuit '"does so not for himself alone but also as a 'private attorney general,' vindicat-

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[22] The Second Circuit found unpersuasive the evidence of business necessity that Bethlehem has presented at trial. *Grant*, 635 F.2d at 1019, 1020.

> ing a policy that Congress considered of the highest importance."'"

Cowan, slip op. at 14 (citations omitted).

Cowan's interpretation of *Riverside* requires the court to make findings supporting the fee awarded. Slip op. at 11. Judge Knapp, in a recent, unpublished opinion, rejected a proportionality argument based on *Riverside* and outlined the factors to consider:

> we rely on factors similar to those which produced a majority decision and were enumerated in Justice Powell's concurring opinion. Specifically, we find that: 1) the jury having determined that the defendants discriminated against the plaintiff on the basis of age and that their actions were wilful, counsel prevailed in all material aspects of this litigation; 2) counsel demonstrated outstanding skill and experience; 3) many attorneys in the community would have been reluctant to institute or continue to prosecute this action; 5) counsel achieved excellent results for her client; and 7) the hourly rates employed in our determination of the lodestar figure are typical of the prevailing market rate for similar services by lawyers of comparable skill.

Pierce v. F.R. Tripler, 1991 WL 45060 *4. (citation omitted).

The factors Judge Knapp considered apply in this case, too. The court has frequently commented on counsel's outstanding skill at various stages of this litigation; Judge Knapp noted that the trial had been presented by "exceptionally competent counsel," Memorandum and Order filed

January 2, 1979 at 1; I noted counsel's skillful representation of the class in denying the motion to dismiss them as class counsel, and, in recommending approval of the settlement, found that the negotiations had been performed by "experienced and competent counsel." Report and Recommendation of June 27, 1987 at 14. Based on the information submitted in their affidavits, counsel are experienced civil rights litigators. *See Huntington*, 749 F. Supp. at 65 ("indisputable" that Steel is "quite experienced" as a civil rights attorney).

In regard to attorney reluctance, it is doubtful that other attorneys would continue this fourteen-year litigation without compensation. *See Weaver v. New York City Employees' Retirement System*, 1991 WL 24320 *1 (S.D.N.Y. 1991) ("clear" that plaintiff could not have obtained private counsel when only $10,000 in dispute; court awarded more than $57,000 in fees). Indeed, as noted in one of my earlier reports, the named plaintiff's motion to dismiss class counsel was denied partly because no other attorney had appeared. Subject to the reductions already discussed, the number of hours claimed is reasonable, and the rates requested are appropriate. Further, counsel obtained for the class most if not all of the potential relief. Only the first factor Judge Knapp considered does not apply here: the Second Circuit found that Bethlehem had discriminated against plaintiffs, but there could be no finding of liability because no trial took place upon remand. Bethlehem concedes, however, that plaintiffs are prevailing parties; plaintiffs and counsel should not be penalized because they saved Bethlehem the expense of going to trial.

Bethlehem argues that if a proportionality rule is not applied, public interest attorneys will have an incentive to do unnecessary work for which no private attorney could

reasonably charge his clients. Bethlehem contends, for example, that compensating plaintiffs in the claimed amount of more than $25,000 for time spent disbursing a $60,000 settlement is unreasonable, because no fee-paying client would pay an attorney so large a proportion of the settlement amount to disburse the settlement. This argument is no more than a restatement of the *Riverside* dissent, see 477 U.S. at 587, which of course, is not the law. I adhere, as I must, to the plurality, which stresses that the rationale behind fee-shifting statutes is to permit parties with meritorious claims to vindicate their rights when the suit would not be profitable enough to enable them to retain private counsel. 477 U.S. at 578 ("A rule of proportionality would make it difficult, if not impossible, for individuals with meritious civil rights claims but relatively small potential damages to obtain redress from the courts. This is totally inconsistent with Congress' purpose in enacting §1988) ("There is a irreducible fixed cost to litigation. If the plaintiff cannot recover that cost in an award of attorney's fees he will find it difficult to hire a lawyer"). As stated, it is highly doubtful that plaintiffs could have obtained private counsel over the course of this litigation.

3. Downward adjustment because of plaintiffs' limited success

Bethlehem also argues that the lodestar should be adjusted downward to reflect what it terms plaintiffs' limited success. A party advocating a reduction of the lodestar bears the burden of establishing that a reduction is justified, *U.S. Football League v. National Football League*, 887 F.2d 408, 413 (2d Cir. 1989), and the court may consider the degree of success in deciding whether to reduce the lodestar figure. *See Hensley v. Eckerhart*, 461 U.S. at 440 ("where the plaintiff achieves only limited success, the district court

should award only that amount of fees that is reasonable in relation to the results obtained").

Hensley clarified the "proper standard for setting a fee award where the plaintiff has achieved only limited success." 424 U.S. at 431. Where plaintiff's claims are based on different facts and legal theories and plaintiff has prevailed on only some of the claims, the unrelated claims are treated as though raised in separate lawsuits and "no fee may be awarded for services on the unsuccessful claim." *Id.* at 435. But where plaintiff's claims arise out of a common core of facts and involve related legal theories, "the most critical factor is the degree of success obtained." *Id.* at 436. In such cases, the court should exercise equitable discretion to arrive at a reasonable fee award, "either by attempting to identify specific hours that should be eliminated or by simply reducing the award to account for the limited success of the plaintiff." *Texas Teachers Ass'n v. Garland School District*, 489 U.S. 782, 789-90 (1989).

Bethlehem implies that plaintiffs' success was limited because they did not obtain injunctive relief and monetary relief totalled only $60,000. Nevertheless, it is doubtful that the *Hensley* analysis applies in the case. In *Hensley* and similar case, plaintiffs achieve limited success because they succeed on only some claims of many alleged. *See Hensley* 461 U.S. at 434; *USFL v. NFL*, 887 F.2d at 413 (20% reduction where plaintiff succeeds on only one of several claims and damages were nominal); *Cefali v. Buffalo Brass Co., Inc.*, 748 F. Supp. 1011, 1018-19 (W.D.N.Y. 1990) (where RICO and state claims dismissed, plaintiffs can recover only for ERISA claim that settled; level of success not high enough to recover lodestar). Here, I cannot say that plaintiffs succeeded on only some claims of many alleged; no claims were dismissed, and the settlement was "intended

to resolve all issues relating to the alleged acts of discrimination by Bethlehem occurring to members of the class." Amended Notice of Pendency of Proposed Compromise of Class Action at 2.

Plaintiff did not receive the desired injunctive relief, but obtaining only one of the remedies requested does not alone justify a reduction in the fee award. *Hensley,* 461 U.S. at 435-36 n.11 ("Nor is it necessarily significant that a prevailing plaintiff did not receive all the relief requested. For example, a plaintiff who failed to recover damages but obtained injunctive relief, or vice versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time"); *McCann v. Coughlin,* 698 F.2d 112, 129 (2d Cir. 1983) plaintiff did not obtain injunctive relief; district court properly did not reduce fees). In the instant case, almost all the litigation concerned liability. There is no indication that the time counsel spent establishing relief—that is, negotiating the settlement—was in pursuit of a nonmonetary remedy, *see Lenihan,* 640 F. Supp. at 826-27 (attorneys should get full fee award where plaintiff prevailed on all her claims but was granted only some of her remedies; attorneys devoted little to establishing appropriate remedy), and those hours identified as in pursuit of injunctive relief have already been reduced. A different result is not required merely because the settlement did not give plaintiffs the injunctive relief requested in the complaint when granting that relief would have been futile. Thus no further reduction is necessary.

Bethlehem implies that a low damage award alone can be viewed as "limited success" and warrant a fee reduction. In *Cowan*, however, the Second Circuit explicitly reaffirmed the holding of *DiFilippo v. Morizio,* 759 F.2d 231 (2d Cir. 1985), stating: "A presumptively correct 'lodestar' figure

should not be reduced simply because a plaintiff recovered a low damage award." Slip op. at 11. Courts may reduce fees where plaintiffs are awarded only nominal damages, *USFL v. NFL*, 887 F.2d at 411-12, but the $60,000 here was not nominal but an estimate based on the two years' worth of back pay the class could have been awarded under Title VII. Bethlehem contends that this case falls under *Friends of the Earth v. Eastman Kodak Co.*, 834 F.2d 295 (2d Cir. 1987). In the case, plaintiffs had alleged 363 violations of a state pollution discharge permit and sought, among other relief, $12 million in civil penalties; the suit settled, with the defendant agreeing to pay $49,000 to a conservation fund. The district court found that plaintiffs were not entitled to the lodestar, because they did not prevail sufficiently "in view of the number of violations alleged by plaintiffs and the penalties sought with respect to each violation." *Id.* at 297. In affirming, the Second Circuit stated that "the settlement suggests there was not much of a pollution problem to begin with." *Id.* at 298. In this case, the size of the settlement is unrelated to whether there was much of a problem to begin with. The Second Circuit remanded to permit Bethlehem to defend its discriminatory conduct.

Bethlehem argues that a reduction is also warranted on the same reasoning by which the *In re Agent Orange* court affirmed denial of a lodestar enhancement. There the court thought the small size of the individual recovery reflected counsel's realization of the weakness of the case, 818 F.2d at 237, and that awarding a risk multiplier would encourage the filing of "dubious actions." *Id.* at 236. Well-developed standards govern enhancements of the lodestar figure, see e.g., *Blum v. Stenson*, 465 U.S. at,898-902 (enhancement for quality of representation and for novelty and complexity); *Missouri v. Jenkins*, 491 U.S. at 293-84 (for delay in payment); *Delaware Valley*, 483 U.S. at 728-731 (for

contingency of success), and Bethlehem cites no authority to show that those same standards govern reductions. Indeed, in affirming the denial of the risk multiplier in *In re Agent Orange*, the Second Circuit noted that "each attorney has received the fair value of his services to the class under the lodestar analysis." 818 F.2d at 237. Accordingly, the lodestar should not be reduced because of plaintiffs' "limited success."

4. Expenses

Awards of attorney's fees in civil rights suits include reasonable out-of-pocket expenses incurred by the attorney and normally charged fee-paying clients. *Reichman v. Bonsignore, Brignati & Mazzotta,* 818 F.2d 278, 283 (2d Cir. 1987). Bethlehem contends that plaintiffs are entitled to only $6034.72 of the $6588.14 requested in expenses on the underlying litigation, which includes such items as postage, copying, and docketing fees, but does not specify which items it contests. Plaintiffs have not requested reimbursement for expenses before 1979, and their expenses seem modest. The expenses claimed on the fee application appear reasonable. I recommend awarding the expenses in their entirety.

5. Ellis's request for fees and costs

Ellis seeks fees and expenses in the amount of $12,323.60. Bethlehem argues that Ellis's request should be denied because pro se litigants are not entitled to attorney's fees. An award of fees to pro se litigants is generally inappropriate, because the primary purpose of §1988 and §2000e-5(k) is to provide access to the court to those who have little or no money with which to hire a lawyer. *See Kay v. Ehrler,* 111 S. Ct. 1435, 1436-37(1991). "A *pro se* plaintiff . . . is not hampered from obtaining counsel and gaining access to the

courts by poverty; he appears himself." *Lawrence v. Staats*, 586 F. Supp. 1375, 1379 (D.D.C. 1984), *aff'd in part and vacated in part on other grounds sub nom. Lawrence v. Bowsher*, _ F.2d _, 1991 WL 73246 (D.C. Cir., May 10, 1991). Accordingly, to the extent Ellis seeks compensation for his own time and for wages lost (items 16-17), in the amount of $2,000, his application should be denied. I also recommend denying the expenses totalling $1,500 (items 1-3) Ellis incurred in attempting to dismiss counsel, as this was a matter of client-attorney relations.

Ellis seeks compensation for postage, hiring a reporter's service, and a $2,185 payment to an attorney retained by Grant and Ellis for a few weeks in 1983. He also seeks dollar amounts that he has assigned to various papers, ranging from $50 for a motion for an extension of time (item 8) to $5000 for an appellate brief (item 1). It appears that Ellis incurred these expenses in objecting to the settlement. An objector to a settlement may properly be awarded fees and costs where the litigation. *Frankenstein v. McCrory Corp.*, 425 F. Supp. 762, 767 (S.D.N.Y. 1977), citing *City of Detroit v. Grinnell Corp.*, 1976 Trade Reg.Rep. ¶ 60,913 at 68,983 (S.D.N.Y. 1976). The objectors cast in sharp focus the question of the fairness and adequacy of the settlement to all members of the class, contributing to the adversary process. *See Frankenstein*, 425 F. Supp. at 767.

As noted, Ellis, as a pro se plaintiff, is not entitled to fees. He may, however, recover costs and out-of-pocket expenses. *Kuzma v. IRS*, 821 F.2d 930, 933-34 (2d Cir. 1987). But Ellis's recovery is subject to the requirements of reasonableness and documentation. *Luna v. Harris*, 691 F. Supp. 624, 628 (E.D.N.Y. 1988). I therefore recommend allowing the expenses of the reporter's service ($203) and postage ($445.60). While Ellis has not supplied documenta-

tion of the latter, the court has knowledge of the mailing he made to class members. *See Luna*, 691 F. Supp. at 629 (court relaxes documentation requirements for pro se plaintiff).

Ellis's attorney's bill indicates he spent most of the time devoted to this case in conference with his clients and other members of his firm, although he also logged a one-hour court appearance, wrote two short letters to the court, and conferred with class counsel and opposing counsel. It appears he contributed little to the litigation for the class's benefit and therefore the payment to him should be disallowed. I recommend the other expenses be denied because Ellis has not explained how he has assigned dollar values and the expenses are wholly undocumented. Nevertheless, I recommend that he be permitted to recover $105, the cost of filing an appeal. Ellis's recommended award totals $753.60.

6. Computing the fee award

Bethlehem contends that plaintiffs have made certain errors in addition. For the purpose of computing the fee award, I accept plaintiffs' arithmetic but recommend that before any order is entered plaintiffs and Bethlehem agree on the addition. A more complete calculation of the award is in the appendix to this report.

	Compensable hours	x Rate	= Award
Levy	1058.68	$225	$238,203.00
Steel	616.95	225	138,813.75
Ratner	279.09	225	62,795.25
Ritz	5.70	135	769.50
Pollack	.81	125	101.25
Behroozi	159.24	115	18,312.60
Fine	.63	115	72.45
Franklin	0.00	115	0.00
paralegals	97.61	40	3,904.40
Friedman	127.54	225	28,696.50
Total fees:			$491,668.70
Expenses: underlying litigation			6,588.14
fee application			665.50
Total expenses			$7,253.64
Total award			$498,922.34

Conclusion

For the reasons stated, I recommend that plaintiffs be awarded a reasonable fee under the circumstances of this case $491,668.70 in fees and $7,253.64 in costs, for a total of $498,922.34, and that Ellis be awarded $753.60 in costs.

Copies of this report have been mailed this date to the parties listed below, who are hereby advised of their right to file objections with Judge Knapp on or before July 8, 1991. *See* 28 U.S.C. §636 (b) (1) (B), Fed. R. Civ. P. 72, 6(a), 6(e). Failure to object by that date will preclude appellate review. *Small v. Secretary,* 892 F.2d 15, 16 (2d Cir. 1989).

Dated: New York, New York
June 18, 1991

Respectfully submitted,

/s/ LEONARD BERNIKOW

LEONARD BERNIKOW
United States Magistrate Judge

cc: Mr. Willie C. Ellis
370 Schley Street
Newark, New Jersey 07112

Wayne A. Cross, Esq.
Reboul, MacMurray, Hewitt, Maynard
& Kristol
45 Rockefeller Plaza
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Leon Friedman, Esq.
148 East 78th Street
New York, New York 10021

APPENDIX

In computing the fee award, I assumed that Levy spent all hours claimed from 3/1/89 and Steel spent all hours from 12/6/88 on the fee application. I reduced Behroozi's time after 10/18/88 by 20% rather than by 30% because it is evident from her time sheets that some hours after that date were spent on tasks other than the fee application.

Steel:	total hours claimed,	721.91			
	underlying litigations:		666.58		
			-4.62	preliminary injunction	
			-19.5	client relations	
			642.46		
			-64.24	(10% reduction)	
			578.22	hours x $225=	
					$130,099.50
	fee application:		15.50	initial application	
			39.83	supplemental	
			55.33		
			-16.60	(30% reduction)	
			38.73	hours x $225=	8,714.25
					$138,813.75
Ratner:	total hours claimed,	330.10			
	underlying litigation:		330.10		
			-12.00	Local 40	
			-8.00	post-trial	
			310.10		
			-31.01	(10% reduction)	
			279.09	hours x $225=	
					$62,795.25
	fee application	0			

Levy:	total hours claimed,	1281			
	underlying litigation:		1240.30		
			-27.15	Local 40	
			-15.00	post-trial	
			-34.00	injunction	
			-19.50	client relations	
			1144.65		
			-114.46	(10% reduction)	
			1030.19	hours x $225=	
					$231,792.75
	fee application:	13.10	initial application		
		27.60	supplemental		
		40.70			
		-12.21	(30% reduction)		
		28.49	hours x $225=		6,410.25
					$238,203.00
Friedman:	total hours claimed,		134.25		
	fee application:	27.25	initial application		
		107.00	supplemental		
		134.25			
		-6.71	(5% reduction)		
		127.54	hours x $225=		$28,696.50
Ritz:	total hours claimed,	6.33			
	underlying litigation:		6.33		
			-.63	(10% reduction)	
			5.70	hours x $135=	
					$769.50
Behroozi:	total hours claimed,		182.8		
	underlying litigation:		130.0		
			-13.0	(10% reduction)	
			117.0	hours x $115=	
					$13,455.00
	fee application	13.5	initial application		
		39.3	supplemental		
		52.8			
		-10.56	(20% reduction)		
		42.24	hours x $115=		4,857.60
					$18,312.60
Franklin:	total hours claimed, 11				
	underlying litigation:		11		
			-11	client relations	
			0		

Fine: total hours claimed,	0.7		
underlying litigation:		0.7	
		-.07	(10% reduction)
		.63	hours x $115=
			$72.45
Pollack: total hours requested,	.9		
underlying litigation:		0.9	
		-.09	(10% reduction)
		0.81	hours x $125=
			$101.25
paralegals: total hours requested,	116.45		
underlying litigation:		116.45	
		-8.00	not documented
		108.45	
		-10.84	(10% reduction)
		97.61	hours x $40=
			$3, 904.40

APPENDIX E

Grant v. Bethlehem Steel Corp.,
823 F.2d 20 (2d Cir. 1987)

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Argued March 17, 1987.

Decided June 30, 1987

No. 697, Docket 86-7767

Roysworth D. GRANT, Willie Ellis, On Behalf of Themselves and All Similarly Situated,

Plaintiffs-Appellants,

Louis Martinez,

Plaintiff-Intervenor-Appellant,

v.

BETHLEHEM STEEL CORPORATION, E. Richard Driggers, James Deavers & Thomas Connelly, Individually and as Agents of Bethlehem Steel Corp., the International Association of Bridge Structural & Ornamental Iron Workers, AFL-CIO; Local 40, Bridge Structural & Ornamental Iron Workers, AFL-CIO; Ray Corbett, Ray Mullett, Jerry Place, Individually and as Officers of Local 40, Bridge Structural & Ornamental Iron Workers, AFL-CIO,

Defendants-Appellees,

The Class of Iron Workers,

Plaintiff-Appellee.

Three named employees brought class action against employer pursuant to Title VII and section 1983, alleging

racial discrimination in employment. The United States District Court for the Southern District of New York, Whitman Knapp, J., dismissed complaint, and employees appealed. The Court of Appeals, 635 F.d 1007, reversed and remanded. On remand, the District Court approved $60,000 settlement of class action and named employee's appealed. The Court of Appeals, Miner, Circuit Judge, held that: (1) even if objectors to settlement represented majority of class, majority opposition would not be total bar to approval of settlement; (2) district court had obligation to protect interests of class members who remained silent regarding settlement; (3) district court did not abuse its discretion in approving settlement agreement, despite fact that all 45 of 126 class members who responded to notice of proposed settlement voiced objections; and (4) district court did not erroneously fail to consider three named plaintiff's entitlement to relief separate from class as whole.

Affirmed.

Willie Ellis, Roysworth D. Grant, Newark, N.J., pro se.

Louis Martinez, Newark, N.J., pro se.

Richard A. Levy, New York City (Eisner & Levy, P.C., New York City, Lewis M. Steel, Steel Bellman & Levine, P.C., New York City, of counsel) for plaintiffs-appellees.

Wayne A. Cross, Joseph J. Iarocci, Reboul, MacMurray, Hewitt, Maynard & Kristol, New York City, of counsel, for defendants-appellees.

Before KEARSE, MINER and MAHONEY, Circuit Judges.

MINER, Circuit Judge:

Plaintiffs-appellants Roysworth D. Grant and Willie Ellis and plaintiff intervenor-appellant Louis Martinez appeal from an order of the United States District Court for the Southern District of New York (Knapp, J.) approving a $60,000.00 settlement of the class action suit instituted under the provisions of Title VII, 42 U.S.C. §§ 2000e *et seq.* (1982), and 42 U.S.C. § 1981 (1982) against defendant-appellee Bethlehem Steel Corporation and three of its supervisors.

On appeal, appellants contend primarily that the settlement should be set aside because all class members responding to the notice of proposed settlement opposed the settlement. We affirm.

BACKGROUND

The general background of the instant appeal is set forth in *Grant v. Bethlehem Steel Corp., 635 F.2d 1007 (2d Cir. 1980), cert. denied,* 452 U.S. 940, 101 S.Ct 3083, 69 L.Ed.2d 954 (1981) ("Grant I"), familiarity with which is assumed. Only those facts necessary for a discussion of the issues presented on this appeal will be set forth below.

On February 20, 1976, appellants commenced this class action in the district court against Bethlehem Steel and three of its supervisors. Appellants alleged that Bethlehem Steel had discriminated against blacks and Hispanics in its selection of ironwork foremen, in violation of 42 U.S.C. §§ 2000e *et seq.* and 42 U.S.C. § 1981.

After an eighty-day bench trial, the district court found that appellants had failed to substantiate their claims of racial discrimination. On January 2, 1979, the district court dismissed their complaint. In *Grant I,* we reversed the district court's order of dismissal, holding that appellants had "made out a prima facie case of not only discriminatory treatment but discriminatory impact as well." *Grant I,* 635 F.2d of 1020. We remanded the case to the district court to permit Bethlehem Steel and its supervisors to introduce evidence that "their discriminatory conduct may have been justified by business necessity, and for any rebuttal testimony by the plaintiffs." *Id.*

On remand, Judge Knapp directed Magistrate Bernikow to explore with the parties the possibility of settlement or, in the alternative, to ensure that the parties were prepared fully for trial. Class counsel and Bethlehem Steel subsequently agreed to a settlement in the amount of $60,000.00. Under the terms of the settlement, Grant, Ellis and Martinez each would receive $2,000.00 apart from their shares of the settlement fund.

After notice of the proposed settlement was served on the class members, Magistrate Bernikow, on June 17, 1985, conducted a fairness hearing, at which the objections of appellants and others were heard. According to appellants, of the 126 members of the plaintiff class, 45 class members opposed the settlement and no responses were received from the remainder of the class. Appellants also claim that 33 letters notifying class members of the settlement were returned.

On July 24, 1986, Judge Knapp adopted Magistrate Bernikow's recommendation that the settlement be approved.

This appeal followed the denial of appellants' request for consideration.

DISCUSSION

Appellants contend primarily that the district court abused its discretion in approving the settlement despite the objections of all responding class members. We disagree.

In approving a proposed class action settlement, the district court has a fiduciary responsibility to ensure that "the settlement is fair and not a product of collusion, and that the class members' interests were represented adequately." *In re Warner Communications Sec. Litig., 798 F.2d 35, 37*(2d Cir.1986) (citing *inter alia, Plummer v. Chemical Bank,* 668 F.2d. 654, 658 (2d Cir.1982). Our role in reviewing the approval of a settlement agreement "is limited to determining whether the district court abused its discretion." *Id.* (citation omitted). We consistently have accorded considerable deference to the district court's extensive knowledge of the litigants and of the strengths and weaknesses of their contentions. *E.g., In re "Agent Orange" Product Liability Litigation MDL No. 381,* 818 F.2d 145, 170-71 (2d Cir.1987). As we noted in *Handschu v. Special Services Div.,* 787 F.2d 828 (2d Cir.1986), the district court "is in the best position to evaluate whether the settlement constitutes a reasonable compromise." *Id.* at 833 (citations omitted). Moreover, it is well established that a settlement can be fair notwithstanding a large number of objectors. *See, e.g. TBK Partners, Ltd. v. Western Union Corp.,* 675 F.2d 456 (2d Cir.1982) (approving settlement despite objections of approximately 56% of class); *Equal Employment Opportunity Comm'n v. Hiram Walker & Sons, Inc.,* 768 F.2d 884 (7th Cir.1985) approving consent decree over objections of 15% of class), *cert. denied,* _ U.S.__ , 106 S.Ct. 3293, 92 L.Ed.2d 709 (1986); *Reed v. General Motors Corp.,* 703 F.2d 170 (5th

Cir.1983) (approving settlement despite opposition fo 40% of class); *Cotton v. Hinton,* 559 F.2d 1326 (5th Cir. 1977) approving settlement despite objections of counsel purporting to represent almost 50% of class), *Bryan v. Pittsburgh Plate Glass Co.,* 494 F.2d 799 (3rd Cir.) (approving settlement over objections of more than 20% of class), *cert. denied,* 419 U.S. 900, 95 S.Ct. 184, 42 L.Ed.2d 146 (1974); *cf. Pettway v. American Cast Iron Pipe Co.,* 576 F.2d 1157 (5th Cir.1978) (disapproving settlement opposed by 70% os subclass), *cert. denied,* 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979). *See generally* 7B C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1797.1, at 409-13 (2d ed. 1986).

Appellants contend that the district court abused its discretion in approving the settlement because "the class opposing the settlement out numbered [sic]any group which the Court had any responsibility at this point to protect." It is true that opposition of a *majority* of a class can have independent significance when, as here, the objection is to the amount of settlement, rather than to distribution of the fund. *See TBK Partners,* 675 F.2d at 462; *cf. Pettway, 576 F.2d* at 1216-17. It is clear, however, that the objectors do not constitute a class majority. Only 45 of 126 class members expressed opposition to the settlement - approximately 36% of the class. Were we to accept appellants' suggestion and discount the 33 letters that were returned, thus reducing the total class to 93, the objectors still would not constitute a majority: 48 class members received notice of the settlement and did not respond-52% of the class of 93. The objectors would represent only 48% of the recalculated class. Therefore, it is apparent that the "silent" class members constituted a majority of the class under either set of calculations. Even if we were to assume that the objectors represented a majority of the class, majority opposition is not a total bar to approval

of a settlement. Preventing a settlement that a district court properly determines to be fair and reasonable solely because of majority opposition "not only deprives other class members of the benefits of a manifestly fair settlement and subjects them to the uncertainties of litigation, but . . . . [may] result[] in the eventual disappointment of the objecting class members as well." *TBK Partners,* 675 F.2d at 462-63 (footnote omitted).

We also reject appellants' assertion that the district court had no obligation to protect the interests of the "silent majority." The fact that many class members remained silent is of little import. The district court had a fiduciary responsibility to the silent class members, despite vociferous opposition to the settlement, and their interests properly were protected by the court. *See Grunin v. International House of Pancakes,* 513 F.2d 114, 123 (8th Cir.) (the district court "act[s] as a fiduciary who must serve a guardian of the rights of absent class members"), *cert. denied,* 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975), *quoted in City of Detroit v. Grinnell Corp.,* 560 F.2d 1093, 1099 (2d Cir.1977) ("Grinnell II").

Appellants also contend that the district court's approval of the settlement was an abuse of discretion because all 45 of the 126 class members who responded to the notice of proposed settlement voiced objections. However, the mere fact that the only class members expressing opinions regarding the settlement were a vocal minority opposing it does not alter the district court's discretion in approving the settlement or its duty to protect the interests of the silent class majority, and we have not been directed to any contrary authority. Appellant's reliance on *Pettway* to support their novel theory is misplaced. The proposed settlement in *Pettway* was opposed not only by the named plaintiffs, but also by 70% of

the affected class and by all of the delegates of a committee representing a large number of class members. *Pettway*, 576 F.2d at 1216-17. The *Pettway* court focused not on the unanimity of opposition, but rather on the large proportion of class members opposing the settlement in relation to the total class size. In contrast, the opposition in the instant case represents approximately 36% of the total class. We perceive no reason why a settlement cannot be considered fair despite oppisition from all who responded when the responding class members were significantly less than half of the class. *See TBK Partners*, 675 F.2d at 462.

Therefore, despite the fact that there was such minority opposition to the settlement, the fairness and reasonableness of that settlement must be the cornerstone of our analysis. In the instant case, Magistrate Bernikow, whose recommendation the district court adopted, thoroughly analyzed the relevant factors. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir.1974) *("Grinnell I"); see also Robertson v. National Basketball Ass'n*, 556 F.2d 682, 684 n. 1 (2d Cir. 1977). He reviewed the risks of establishing liability, the complexity, expense and likely duration of the litigation, and the likely recovery after a full trial. Specifically, the magistrate noted: that backpay could be recovered for, at most, three years; that recovery potentially could be limited to a two-year period; and that there was a possibility of "a lesser or no recovery after trial." He also compared the amount of the settlement to the likely result after trial, *see Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir.1983), and determined that the class "would be obtaining [most], if not all, of the potential recovery." Magistrate Benikow examined Bethlehem Steel's proposed offer of proof upon remand and concluded that further litigation would be "complex, costly, and time consuming." He ascertained that the settlement was reached after extensive negotiations without collusion, and

considered carefully the objections to the settlement. We perceive no error in the magistrate's determination that the settlement was "manifestly fair and reasonable." We conclude, therefore, that the district court did not abuse its discretion in approving the settlement under the circumstances of this case.

Appellants assert numerous other claims, only two of which require discussion. Appellants claim that the district court erroneously failed to consider "the three named plaintiffs' entitlement to relief separate from the class as a whole." However, under the terms of the settlement, each of the three named plaintiffs will receive $2,000.00 apart from their shares of the settlement fund, in recognition of their efforts on behalf of the class. In addition, appellants failed to present to the district court any evidence indicating that they had suffered financial losses greater than other members of the class. Moreover, appellants' attempt to distinguish themselves from other class members because they actually applied for supervisory positions is unavailing. As we noted in *Grant I*, non-applicants also may be the victims of discrimination, despite the fact that they failed to apply for the supervisory position, when the filing of an application would have been futile. *See Grant I, 635* F.2d at 1017. Appellants' claim that no record of the fairness hearing exists is belied by appellants' own appendix, which contains a full record of the hearing conducted by the magistrate. We have reviewed carefully appellants' remaining contentions and find them to be without merit.

CONCLUSION

Based on the foregoing, the order of the district court is affirmed.

APPENDIX F

Grant v. Bethlehem Steel Corp.,
No. 76 Civ. 0847 (WK)
(S.D.N.Y. June 27, 1986)

Report & Recommendation
of the Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROYSWORTH D. GRANT, WILLIE ELLIS,
on behalf of themselves and all others similarly situated,
Plaintiffs,

—and—

LOUIS MARTINEZ,
Plaintiff-Intervenor,

—against—

BETHLEHEM STEEL CORPORATION, E. RICHARD DRIGGERS, JAMES DEAVER, and THOMAS R. CONNELLY,
Defendents.

REPORT AND RECOMMENDATION

76 Civ. 0847 (WK)

TO THE HONORABLE WHITMAN KNAPP, U.S.D.J.:

This report concerns the motion by counsel for plaintiff class and defendants to approve a settlement of this class action.

The facts of this case are set out in the unreported opinion of the District court, dated December 27, 1978, and the

opinion of the Court of Appeals, 635 F.2d 1007 (2d Cir. 1980) *cert. denied,* 452 U.S. 940 (1981), familiarity with which is assumed, and therefore will not be repeated at length. Suffice it to say, this is an employment discrimination case brought by three ironworkers, two blacks and one dark skinned Puerto Rican, pursuant to Title VII of the Civil Rights of 1964, 42 U.S.C. §§ 2000e *et seq.*, and 42 U.S.C. § 1981. The defendants are the Bethlehem Steel Corporation ("Bethlehem") and three of its supervising employees. Plaintiffs allege that Bethlehem discriminated against black and Puerto Rican ironworkers in its practices of appointing ironwork foremen in the New York City metropolitan area.

After an eight day bench trial in 1978, the District Court dismissed plaintiff's complaint. The Court of Appeals, however, reversed the dismissal, finding that plaintiffs had made out a prima facie case of discriminatory treatment and impact. 635 F.2d at 1017. The Court remanded the matter to permit defendants to introduce additional evidence that their discriminatory conduct may have been justified by business necessity, for any rebuttal testimony by plaintiffs, and for proof of damages. *Id.* at 1020.

Thereafter, this case was referred to me to exhaust the possibility of settlement and, failing a settlement, for all pretrial purposes. After an extended period, counsel for plaintiffs and counsel for Bethlehem agreed to a settlement in the amount of $60,000.

The named plaintiffs, however, objected to the settlement and sought to discharge the attorneys for the class ("counsel"). They also submitted papers in opposition to the settlement and the proposed notice to the class. By report and recommendation dated August 2, 1983, I recommended that the named plaintiffs' objections not be considered until

the hearing on the settlement, and that the proposed notice be amended. My report was approved by order dated October 17, 1983.

At a conference held on December 23, 1983, the named plaintiffs argued that I had failed to rule on their application to have counsel removed. Although in my August 2, 1983 report I implicitly denied that application, I indicated at the conference that I would rule on it again, formally, after the parties submitted further papers. Following the parties' submissions, by report and recommendation dated November 1, 1984 I recommended that the motion to discharge counsel, and for a trial on that issue, be denied. That report was approved by order dated November 26, 1984.

A notice of the hearing on the proposed settlement was prepared and sent to the members of the class. The notice indicated that the named plaintiffs objected to the settlement because the sum for the class was inadequate, the specific awards to the named plaintiffs were also inadequate, and because the settlement contained no provision for additional non-monetary relief. The date for the hearing was scheduled for June 17, 1985. The named plaintiffs, however, sought sixty day postponement of that date. The basis for their request was that counsel did not provide them with a list of the names and addresses of the class members until May 21, 1985. Although the request was not by itself unreasonable, by order dated June 11, 1985 I denied the request, primarily because the notice of the hearing had already been sent to the class members.

The hearing on the settlement was held, as scheduled, on June 17, 1985. At that time, in response to the named plaintiffs' request for an adjournment, I granted them an additional ninety days to obtain other objections from class

members they had as yet been unable to contact, and to respond to an affidavit I had asked counsel to submit.

In support of the reasonableness of the settlement, counsel argue that, by reason of the applicable statutes of limitation, the back pay claims go back at most to February 1973—three years before the complaint was filed—and could continue to the end of 1976, when Bethlehem went out of the structural steel business.

During that period, 1973 to 1976, counsel found that thirty-seven white foremen worked for Bethlehem: seventeen were working in 1973, eleven more became foremen in 1974, eight more in 1975, and one more in 1976. Then counsel determined the amount of foremen's work these white foremen performed. In doing so, counsel assumed that the seventeen men who were foremen in 1973 worked continuously to the end of 1976. This same assumption was made concerning the others who became foremen in 1974 and 1975. Counsel further assumed that, since the foremen who started in 1973 did so at different times during that year, they on average worked a half year in 1973 and three additional years—for each a total of 3.5 years. The same assumption was made regarding those who began in 1974 and 1975. The individual who became a foreman in 1976 was assumed to have worked as a foreman for that entire year.

The next step counsel took was to determine how much of the work of the foremen would have been performed by black and Hispanic ironworkers absent the alleged discrimination. Black and Hispanic ironworkers, according to counsel, made up approximately ten percent of the ironworkers employed by Bethlehem.

From the foregoing figures, counsel calculated that of the seventeen foremen in 1973, ten percent of that number, or 1.7—in reality two—should have been black or Hispanic. Similar calculations were made for the following years. From these calculations counsel concluded that plaintiffs' class was deprived of a total of eleven years of "foreman's work."

The difference between the earnings of foremen and ironworkers was then calculated by comparing the annual salary of the highest twenty percent in each group. Counsel determined that the average annual difference in earnings between foremen and ironworkers from 1973 and 1976 amounted to $5,647.00, which was rounded out to $5,600.00. This sum, multiplied by the eleven years mentioned in the preceding paragraph, amounts to $61,600.00. As noted, the amount of the proposed settlement was $60,000.00.

Counsel also pointed out that they had to consider the possibility that plaintiffs might not have prevailed at trial. Bethlehem, counsel continue, intended to retry every possible question bearing on liability, including the relative qualifications of each black and Hispanic ironworker and each foreman actually hired. *See* Exhibit I to Affidavit in Support of Proposed Settlement of Class Action ("Affidavit in Support"). In addition, counsel say, Bethlehem would argue that black and Hispanic ironworkers, as a group, were less qualified to fill foremen position than white ironworkers. Counsel also say that among the white ironworkers, Bethlehem would argue, as it did before, that there already existed a large pool of men who were tried and proven Bethlehem foremen.

Finally, counsel submit that Bethlehem would argue that the applicable pay period was two years, the Title VII period,

and not three years, the period under 42 U.S.C. § 1981, which requires proof of discriminatory intent. As previously mentioned, the proposed settlement is based upon the more liberal three-year period.

The foregoing factors, along with the virtual certainty of further protracted and difficult litigation, convinced counsel that the best interest of the class members would be served by accepting the $60,000.00 offer.

The named plaintiffs, on the other hand, oppose the settlement for a number of reasons. First, they complain that the law firm they hired initially had broken up. Second, they complain that they did not have any meaningful contact with their former attorneys. They say they were never given an opportunity to review papers their former counsel submitted to the court on their behalf. In short, they say that counsel, while acting as their attorneys, never consulted with them. On the merits of the settlement, the named plaintiffs reject the formula counsel used in concluding that $60,000 was a reasonable sum. They complain that the first time they heard of counsel's formula was at the hearing, *see* tr. 48, notwithstanding their requests that counsel provide them with the formula so they could present it to the Justice Department to have it reviewed. But the principal area of dispute between the named plaintiffs and counsel concerns the scope of this litigation. As will be discussed below, the named plaintiffs view this case much more broadly than do counsel.

The named plaintiffs have also moved to discharge counsel as representatives of the class. One of the complaints in connection with the motion to discharge counsel concerns are list of black and Hispanic ironworkers counsel provided. The named plaintiffs, after reviewing the list, discovered that some of the information on the list was obsolete. According-

ly, the named plaintiffs tried to contact the ironworkers on the list they found that many no longer resided at the addresses indicated, though they were still members of Local 40. Instead, the named plaintiffs have submitted thirty-three envelopes that were returned to them because the addressees no longer lived at the listed addresses. The named plaintiffs also speculate that many of the envelopes they sent were received by persons other than the addressees, but not returned, because the envelopes were simply discarded.

Still, the named plaintiffs, through their efforts, were able to contact twenty black and Hispanic ironworkers, all of whom have submitted affidavits indicating their opposition to the settlement and the continued representation by counsel. At the June 17 hearing all class members that appeared—eleven in number—opposed the settlement. On November 21, 1985, the named plaintiffs submitted six additional affidavits from class members voicing their opposition to the settlement and the retention of counsel. On January 30, 1976, the named plaintiffs submitted another four affidavits expressing the same views.

It appears then that all of the class members who have communicated with the court are opposed to the settlement and to their continued representation by counsel. Indeed, it appears that these class members agree with the views of the named plaintiff . . . The notice to the class, however, was mailed to approximately 160 people, according to the affidavits of service in the file.

"The central question raised by the proposed settlement of a class action in whether the compromise is fair, reasonable and adequate. . . . The primary concern is with the substantive terms of the settlement: 'Basic to this . . . is the need to compare the terms of the compromise with the likely

rewards of litigation.'" *Weinberger v. Kendrick,* 698 F.2d 61, 73 (2d Cir. 1982), *cert. denied,* 464 U.S. 818 (1983) (quoting *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 424-25 (1968).

To determine whether the settlement is fair, the objections raised by the named plaintiffs must be examined. The named plaintiffs dispute counsel's view that recovery of back pay is limited solely to those black and Hispanic ironworkers who were employed by Bethlehem and were in a position to be elevated to foremen. They also dispute counsel's calculations of the back pay period from 1973 to 1976.

With regard to the scope of this litigation, the class in this action was defined as follows:

> The class against said defendants includes all black and Puerto Rican ironworkers who may have been qualified or otherwise eligible to be hired, upgraded and promoted to or considered or trained for any supervisory position with Bethlehem Steel Corporation at any of its structural steel construction projects within the greater New York metropolitan area . . . .

It appears from this description, as counsel argue, that this case is limited to the issue of discrimination at the supervisory level. Nothing in the opinion of the Court of Appeals manifests an intent to broaden the scope of the litigation.

The named plaintiffs also argue that the Court of Appeals did not limit this litigation to ironworkers employed by Bethlehem. The finding of the Court, the argument goes, extended to black and Hispanic workers not employed by

Bethlehem. The named plaintiffs support this position by citing the Second Circuits's concern for non-applicants who may have been deterred by a known discriminatory policy. *See* 635 F.2d at 1016.

In response, counsel say, the Court of Appeals's reference to non-applicants concerned ironworkers employed by Bethlehem who may have been deterred from applying for supervisory positions. According to counsel, back pay would not be awarded to ironworkers who were never employed by Bethlehem as ironworkers and never sought supervisory employment with the company. Counsel also note that at the time of the hearing their efforts to locate any minority ironworkers other than the named plaintiffs who had applied for supervisory positions were unsuccessful. As for the ironworker positions, counsel submit that it is unlikely that candidates were deterred from applying for entry level positions with Bethlehem, because on most of its jobs Bethlehem employed higher percentages of black and Hispanic employees than their respective percentages of membership in the unions from which they were referred.

The named plaintiffs have not taken issue with counsel's statement regarding the higher percentages of black and Hispanic ironworkers at Bethlehem. But more than that, the Court of Appeal's reference to a discriminatory practice as a deterrent, 635 F.2d at 1016, does not indicate an intent to expand this action beyond the already defined class. I find then that this action is limited to ironworkers employed at Bethlehem.

The named plaintiffs also challenge counsel's view that the relevant time period extends from 1973 to 1976. And, plaintiffs contend, relief other than back pay could be awarded in this case, and was envisioned by the Court of

Appeals. They point to Bethlehem's other businesses, to which affirmative relief such as training could be applied.

Counsel respond that, in their judgment, any award of such additional relief would be unlikely. Counsel observe that they know of no case in which a company, no longer engaged in the business in which the discrimination occurred, has been directed to employ people elsewhere or to provide training.

Counsel's position seems well taken, even though it is difficult at this time to predict what relief, other than back pay, the court might fashion. To be sure, under Title VII the court has exceedingly broad remedial power to make an aggrieved party whole. *See, e.g., Darnell v. City of Jasper, Alabama,* 730 F.2d 653, 655 (11th Cir. 1984); *Association Against Discrimination in Employment, Inc. v. City of Bridgeport,* 647 F.2d 256, 278-279 (2d Cir. 1981), *cert. denied,* 455 U.S. 988 (1982). But injunctive relief of the kind contemplated by plaintiffs is problematical because Bethlehem is no longer in the structural steel business. Moreover, the increasingly lengthy passage of time in this case would appear to call into question the appropriateness of retraining or other similar additional remedy.

In any event, the basic reason for plaintiffs' opposition to the proposed settlement is their dissatisfaction with the amount of the settlement. But as to back pay, it is clear that the relevant time period is at most three years, 1973 to 1976. Further, there is a possibility that, after trial, any back pay would be limited to the two year Title VII period. As mentioned, to recover under 42 U.S.C. § 1981, which would permit a three year period, plaintiffs must show discriminatory intent. Thus, even if plaintiffs were successful on all of their claims, the most they could reasonably expect to recover

is the amount of the proposed settlement. The objectors, as counsel say, have offered no sound assessment of how an amount higher than the proposed settlement could be recovered at trial. There is also the possibility of a lesser or no recovery after trial. As noted, Bethlehem would have an opportunity at trial to show "that their discriminatory conduct may have been justified by business necessity." 635 F.2d at 1020.

In determining fairness, a relevant factor is the substantive terms of the settlement compared to the likely result at trial. *See, e.g., Malcham v. Davis,* 706 F.2d 426, 433 (2d Cir. 1983). In many proposed settlements, of course, only a portion of the relief requested is offered, and the court must determine if that portion is reasonable in light of the risks of litigation. Nevertheless, "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455(2d Cir. 1974). In this case, however, plaintiffs would be obtaining must, if not all, of the potential recovery.

It is true that the Court of Appeals held that plaintiffs had made out a prima facie case of discriminatory treatment and discriminatory impact. Yet despite the named plaintiffs' settlement to the contrary, liability on the part of defendants has not yet been established. As mentioned above, on remand Bethlehem intends to retry every possible issue bearing on liability. Indeed, from Bethlehem's outline of proposed further proof upon remand, Exhibit I to Affidavit of Support, it appears that the litigation on remand will be complex, costly, and time consuming. Moveover, as counsel observe, no proposed attorney has yet to appear for the objectors.

This case, however, presents the anomalous situation of a exceedingly fair and reasonable settlement—arrived at after extensive arm's length negotiations by experienced and competent counsel—that is opposed by a not insubstantial portion of the class. As the Second Circuit has observed:

> A settlement can, of course, be fair notwithstanding a large number of objectors. *See, e.g., Cotton v. Hinton,* 559 F.2d 1326, 1331 (5th Cir. 1977) (approving settlement over objections of counsel purporting to represent almost 50% of class); *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799 (3d Cir.) (approving settlement over objections of 20% of class), *cert. denied,* 419 U.S. 900, 95 S.Ct. 184, 42 L.Ed. 146 (1974). But although majority rule should not necessarily be a litmus test for the fairness of proposed settlement, the opposition to a settlement by a majority of a class is significant. *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1216-17 (5th Cir. 1978) (disapproving settlement opposed by 70% of subclass), *cert. denied,* 439 U.S. 1115, 96 S.Ct. 1020, 59 L.Ed.2d 74 (1979). Especially when a dispute centers on the sufficiency of a settlement fund rather than the allocation of a fund, majority opposition to a settlement tends to indicate that the settlement may not be adequate since class members presumably know what is in their own best interest. Nevertheless, majority opposition to a settlement cannot serve as an automatic bar to settlement that a district judge, after weighing all the strengths and weaknesses of a case and the risks of litigation, determines to be manifestly reasonable. Preventing settlement in such circumstances not only deprives other class members of the benefits of a manifestly fair settlement and subjects them to the uncertainties of litigation, but, in this case, would most likely have resulted in the eventual disappointment of the objecting class members as well.

TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 462-63 (2d Cir. 1982) (approving settlement where over fifty-four percent of class members objected).

Applying these principles to the present case, I am compelled to recommend that the settlement be approved. The settlement in this case in manifestly fair and reasonable. Notwithstanding the vigorous dissatisfaction of the objectors, rejecting the settlement would deprive other class members of the benefits of the settlement and could result in the eventual disappointment of the objectors and the nullification of the extensive efforts of their counsel.

With regard to counsel, though all the objectors seek, with the named plaintiffs, to discharge counsel, I do not believe the interests of the class would be served by such action. Counsel are experienced and competent, and have worked diligently. The objectors' dissatisfaction with counsel's efforts is based on the amount of the settlement, but, as this report attempts to show, the amount of the settlement is fair and reasonable.

For the reasons stated, I recommend that the settlement in the sum of $60,000 be approved, and counsel not be discharged.

Copies of this report have been mailed this date to the parties listed below, who are hereby instructed that any objections to this report should be filed within thirteen days from this date. *See* Fed. R. Civ. R. 72(b), 6(e)

Dated: New York, New York
June 27, 1986

Respectfully submitted,

/s/ LEONARD BERNIKOW

LEONARD BERNIKOW
United States Magistrate

cc: Roysworth D. Grant
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Brooklyn, New York 11225

Willie Ellis
280 Pomona Avenue
Newark, New Jersey 07112

Richard A. Levy, Esq.
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New York New York 10003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORDER

ROYSWORTH D. GRANT, WILLIE ELLIS,
on behalf of themselves and all others similarly situated,
Plaintiffs,

—and—

LOUIS MARTINEZ,
Plaintiff-Intervenor,

—against—

BETHLEHEM STEEL CORPORATION, E. RICHARD DRIGGERS, JAMES DEAVER, and THOMAS R. CONNELLY,
Defendants.

76 Civ. 0847 (WK)

Bernikow, United States Magistrate:

The following corrections should be made in my report and recommendation to Judge Knapp dated June 27, 1986:

page 13, line 23: "must" should read "most";

page 14, line 14: "a" should read "an"; and

page 17, line 19: "2055" should read "2065".[1]

The following individual (who is being served by mail today with a copy of the report) should be added to the service list:

George Grollman, Esq.
475 Fifth Avenue
New York, New York 10017

The report should be deemed amended accordingly.

So ordered.

Dated: New York, New York
July 1, 1986

/s/ LEONARD BERNIKOW

LEONARD BERNIKOW
United States Magistrate

cc: Roysworth D. Grant
245 Rogers Avenue
Brooklyn, New York 11225

Willie Ellis
280 Pomora Avenue
Newark, New Jersey 07112

[1]Another copy of the report was mailed to Roy E. Brown at the correct address on June 30, 1986.

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APPENDIX G

Grant v. Bethlehem Steel Corp.,
635 F.2d 1007 (2d Cir. 1980)

UNITE STATES COURT OF APPEALS
SECOND CIRCUIT.

Argued April 2, 1980

Decided Nov. 26, 1980

Royworth D. GRANT and Willie C. Ellis, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

and

Louis Martinez,
Plaintiff-Intervenor-Appellant,

v.

BETHLEHEM STEEL CORPORATION,
James Deaver, Eugene R. Driggers, and Thomas C. Connolly, individually and as agents of Bethlehem Steel Corporation et al.,
Defendants-Appellees.

Plaintiffs, two black and one dark skinned Puerto Rican iron workers, brought class action against employer and three of its supervisory employees alleging that it had discriminated against blacks and Hispanics in its selection of iron worker foreman, thereby violating Title VII of the Civil Rights Act of 1964. The United States District Court for the Southern District of New York, Whitman Knapp, J., dismissed the

complaint, and plaintiffs appealed. The Court of Appeals, Mansfield, Circuit Judge, held that plaintiffs made out a prima facie case of both discriminatory treatment and discriminatory impact from a facially neutral selection procedure.

Reversed and remanded.

Richard A. levy, New York City (Lewis M. Steel, Eisner, Levy, Steel & Bellman, P.C., New York City, of counsel), for plaintiffs appellants.

Wayne Cross, New York City (Ralph L. McAfee, Cravath, Swaine & Moore; Reboul, MacMurray, Hewitt, Maynard & Kristol, New York City, of counsel), for defendants appellees.

Michael D. Ratner, New York City, for plaintiff intervenor appellant.

John S. Martin, Jr., U.S. Atty., for the Southern District of New York, New York City (Barbara L. Schulman, Dennison Young, Jr., Asst. U.S. Attys., New York City, Drew S. Days, III, Asst. Atty. Gen., Civ. Rights Div., U.S. Dept of Justice, Washington, D.C., of counsel), for amicus curiae United States.

Leroy D. Clark, Gen. Counsel, Equal Employment Opportunity Commission, Washington, D.C., for amicus curiae Equal Employment Opportunity Commission.

McGuiness & Williams, Washington, D.C. (Robert E. Williams, Douglas S. McDowell, Edward E. Potter, Washington, D.C., of counsel), for amicus curiae Equal Employment Advisory Council.

Before LUMBARD, MANSFIELD and KEARSE, Circuit Judges.

MANSFIELD, Circuit Judge:

Appellants, two black and one dark skinned Puerto Rican ironworkers, brought this class action against Bethlehem Steel Corporation and three of its supervisory employees in the District Court for the Southern District of New York, alleging that it had discriminated against blacks and Hispanics in its selection of ironwork foremen, thereby violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, *et seq.*, 42 U.S.C. § 1981 and Executive Order 11246, and as a remedy sought backpay. After a bench trial Judge Whitman Knapp on December 27, 1978, entered a Memorandum and Order dismissing the complaint. We reverse and remand for further proceedings. Contrary to the conclusions reached by the district court, appellants made out a prima facie case of both discriminatory treatment, see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1972), and discriminatory impact from a facially neutral selection procedure, see *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1970); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 349, 97 S.Ct. 1843, 1861, 52 L.Ed.2d 396 (1977).

Bethlehem Steel Corporation's Fabricating Steel Construction Division (Bethlehem), until it ceased operations in March 1976, was engaged in construction of steel framework for bridges, skyscrapers, hospitals, air terminals and other structures. For this work, which is hazardous, it employed ironworkers who performed jobs ranging from such unskilled tasks as carrying planks to be laid down for flooring, to the more skilled operations of welding or bolting up steel structures. The ironworkers worked together in groups or

"gangs" of three to six, each under the leadership of a foreman or "pusher." No special education or training was required for the job of ironworker. To become a foreman, however, an ironworker, because of the dangerous nature of work, should possess safety consciousness, leadership qualities and productiveness.

As the district court found, "[p]rior to the enactment of Title VII there has been a long history of discrimination against blacks in the hiring of ironworkers in the New York Metropolitan area." In the late 1960's, as a result of a building boom which led to a shortage of ironworkers, and a certain amount of community pressure, blacks were admitted into the ironworker trade, working on permits issued by the union. Until 1970, however, blacks were underrepresented in the trade. During the period from 1970 to 1975, which is a crucial time frame for purposes of this appeal, blacks filled approximately 10% of the 1,018 ironworker jobs on 10 representative Bethlehem projects.[1] During this same period approximately 126 ironworkers, of whom 97 had had prior experience as Bethlehem foremen, were appointed foremen on the 10 projects. Of these only one was black (Nolan Herrera).

The method used for selection of foremen on Bethlehem's steel projects were at best rather haphazard. On each steel construction project Bethlehem employed a project superintendent who chose the foreman for the project. The Superintendents, all of whom were white, were given uncontrolled discretion to hire whom they pleased. As the district court found, "It is not disputed that the superintendents hired by word of mouth on the basis of wholly subjective criteria."

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[1] During the period from 1973 to 1976, 11.8% of Bethlehem's ironworker force was black or Puerto Rican.

No foremen's job were posted and no list of eligible foremen was kept. Instead, upon hearing informally of an upcoming Bethlehem project, of which the superintendent would learn as much as eight months to a year in advance, he would communicate with persons whom he knew in the trade or who were recommended to him by others and line them up as prospective foremen for the project. Under this practice of pre-job hiring those interested in the job of foreman would rarely have the chance to apply for the job on any given project, since only persons solicited by the superintendent would know of the project in advance. By the time the project became known generally and notice of it was posted in the union hiring hall, there would usually no longer be any openings available for the job of foreman.

By the early 1970's the three appellants had all had extensive ironworker experience. Martinez, a 53-year-old dark-skinned Puerto Rican, started as a permit-man, became a union member in 1969 and had worked as foreman on projects for other companies. In 1969 he became a foreman on a large Bethlehem project (Astor Plaza), where he earned an excellent reputation, despite which he was never again chosen as a foreman. Grant, a 51-year-old black, had been an ironworker singe age 14, had mastered almost every aspect of the trade, had served as a supervisor on many jobs in Trinidad, and had worked on many structural steel jobs in New York, including the World Trade Center and the Celanese Corporation building. For 10 years he had worked as an ironworker for Bethlehem. Ellis, a black American in his 40's, likewise had wide ironwork experience, engaging in such skilled operations as bolting, fabricating and welding. He had served as a foreman for Harris Structural Steel Corporation and Koch Construction Company before going to work for Bethlehem.

Despite their qualifications and their repeated requests to Bethlehem for assignment to the position as foreman, none of the appellants was ever appointed to that job. Their efforts were frustrated principally by two Bethlehem project superintendents, James Deaver and Eugene Driggers, who were responsible for hiring most foremen on 10 representative Bethlehem projects in the New York Metropolitan area. Deaver who was a superintendent on many Bethlehem projects for 14 years prior to 1976, never appointed a black or Puerto Rican. His practice was to appoint white foremen by word of mouth from among friends and those recommended by other foremen, union officials or superintendents. His attitude toward appointment of blacks as foremen was summarized by Judge Knapp, "There is no question in my mind . . . that a black man had a much higher threshold of acceptability than a caucasian in Mr. Deaver's mind." Similarly Driggers, who had been a Bethlehem superintendent for many years on some 35 projects, 90% of which were in the New York Metropolitan area, had never appointed a black or Puerto Rican. He likewise appointed white foremen by word of mouth from among friends or persons known to him or those referred to him by others. Although he conceded that some minority ironworkers, including Martinez, had performed satisfactorily and were capable of being foreman, he excused his failure to make appointments of blacks or Puerto Ricans on the grounds that he "didn't know any" and that "nobody [had] ever worked with me to become one." Neither Deaver nor Driggers ever kept any lists of ironworkers qualified to become foreman.

Superintendents Deaver and Driggers defended their subjective hiring practices by pointing to the dangerousness of ironwork and asserting that no objective method of evaluation would have let them effectively determine individuals' competence to handle the heavy responsibility of

foremanship. In selecting foremen they tended to call back men who had worked before as Bethlehem foremen: since ironwork is project-oriented, with laborers and foremen from a completed project returning to the same pool until opportunities at a new project became available, superintendents frequently had ready access to experienced Bethlehem foremen from within the ironworkers' ranks. Of the 126 foreman positions at issue here, 97 went to men who had worked as foremen on previous Bethlehem projects. Several of the remaining hirees had worked as foremen for other ironwork companies. Others had served as ironworkers at Bethlehem before becoming foremen.

Appellants attack the superintendents' word-of-mouth hiring system as discriminatory in both treatment and impact. They assert that friendship and nepotism rather than assessment of ability formed the basis for the superintendents' selections, and that since blacks tended to be excluded from the all-white superintendents' friendship, they were also unlawfully excluded from jobs as foremen. In support of these allegations, appellants point out that the supervisors often went to considerable length to solicit people whom they knew for foreman positions, sometimes calling them on the phone or personally going to ask them to work. One superintendent, Driggers, hired his two sons as foremen, notwithstanding that they had less ironwork experience than the three named plaintiffs and had not served as foremen before. On another occasion, Superintendent Deaver hired a foreman whom he knew had a drinking problem. One member of the gang which this man supervised suffered a fatal accident because he was not following safety regulations. Similarly, Deaver rehired a foreman who had lost a gang member on his last project when a column for which he was responsible fell; the same foreman lost a derrick on the new project, and left work with a nervous breakdown. Appellants

urge that concern for workers' safety could not have been the primary motive behind these hirings.

Appellants further assert that the subjective word-of-mouth hiring was unnecessary. They observed that Bethlehem recognized the feasibility of an objective system for hiring of foremen when, in bidding on government contracts, it represented that it would conform to the Equal Employment Opportunity Commission's hiring guidelines, incorporating into these contracts a manual called "A Guide to Equal Employment Opportunity," which Bethlehem Steel had prepared and published for the guidance of its hiring authorities. That manual mandated selection by merit and assurance that qualified minority employees in each unit would have a full opportunity to hear about and compete for available jobs. It required that (1) a job analysis be made to determine the qualifications for each supervisory position, (2) a list of employees in each unit be maintained with each employee's race and position identified, and (3) job notices be posted at each operation and a current list of available vacancies be kept. Although there is evidence that Bethlehem incorporated the Guide selectively in certain contracts, it is unclear whether it actually complied with its requirements in its performance of those contracts.

The district court held that plaintiffs had failed to make out a prima facie case of either discriminatory impact or discriminatory treatment. It took the view that foremen must necessarily be hired according to the superintendents' subjective evaluations of their ability to promote safety and productive work, since there were no readily identifiable objective criteria for determining who would be capable of undertaking such a responsibility. Judge Knapp declined to hold that either Deaver or Driggers had intentionally discriminated against any of the appellants.

The district court also rejected plaintiffs' statistical evidence of discriminatory impact attributed to defendants' hiring practices which was based on Bethlehem's hiring of only one black in its recruitment of some 126 foremen during the period 1970-75. He held that the underlying assumption, that the percentage of black ironworkers qualified to become foremen the same as that of whites, was erroneous because blacks had been substantially excluded from the ironwork trade during the 1960's with the result that the percentage of whites who were experienced and qualified to become foremen was greater than the percentage of blacks. He also held that when presenting their statistical case plaintiffs should not have considered foreman positions that had been offered to men with previous experience as Bethlehem foremen. Such rehiring, he believed, constituted a legitimate neutral business practice, considering the importance of experience as a factor for protection of laborers' safety. Therefore, in his view, the relevant statistic was not one black in 126 foreman selections, but one black in 29 selections of foremen without prior Bethlehem foreman experience. He held that this statistic did not establish a prima facie case, since the hiring of only one more black would have significantly changed the balance in such a small sample.

Having rejected plaintiff's statistical proof of discriminatory impact resulting from facially neutral hiring practice, Judge Knapp concluded that plaintiffs had also failed to make out a case of discriminatory treatment under the formula laid down in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and repeated many times thereafter, *see Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978). He found two central

difficulties with this portion of their case. First, since plaintiffs had not adduced the testimony of any blacks other than themselves who had applied for foreman jobs and been passed over in favor of whites, he refused to infer from the depositions of Deaver and Driggers that other blacks besides the plaintiffs had been passed over after applying. Second, he found that the three named plaintiffs had failed to establish all of the elements of a prima facie case of discriminatory treatment as described in *McDonnell Douglas v. Green, supra.* where the Supreme Court held that in order to establish a prima facie case a plaintiff must prove

(i) that he belongs to a racial minority;
(ii) that he applied and was qualified for a job for which the employer was seeking applicants;
(iii) that, despite his qualifications, he was rejected; and
(iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Judge Knapp asserted that, since plaintiffs' applications were almost all made after the superintendents had already hired a full complement of foremen for the projects on which they wished to work, plaintiffs had failed to show that they had applied for a job for which Bethlehem was seeking applicants, or that it had continued to seek applicants after rejecting them.

With respect to one instance where Driggers had hired a foreman after one of the plaintiffs had applied for the same job, Judge Knapp stated that he did not believe that Driggers remembered the prior application when hiring the new man. Though Judge Knapp admitted that "if Bethlehem's heart had

been in the right place they might have thought of Martinez and sought him out in order to make him a foreman," he declined to find any legal mandate for Bethlehem to do so. Relying of *Furnco Construction Co. v. Waters, supra.* he stated: "Title VII does not obligate an employer to maximize the employment of blacks, but allows a finding of liability only upon a showing that its practices discriminated against them."

DISCUSSION

Appellants contend that the district court committed various errors in holding that they had failed to make out a prima facie case of discriminatory treatment and discriminatory impact under Title VII of the 1964 Civil Rights Acts. Consideration of their claims requires a brief review of governing principles.

As the Supreme Court pointed out in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335-36 n.15, 97 S.Ct. 1843, 1854 n.15, 52 L.Ed.2d 396 (1977), discriminatory or disparate treatment in violation of Title VII occurs where "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." "Disparate impact," on the other hand, results from the use of "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." Id., 431 U.S. at 336 n.15, 97 S.Ct. at 1854 n.15. Proof of motive is not required to sustain a claim of disparate impact.

In order to make out a prima facie case of discriminatory treatment of plaintiff must ordinarily meet the four requirements established by the Court in *Mc Donnell Douglas,* which are set forth above. Such conduct "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. See *Teamsters v. United States, supra,* at 358, n.44 [97 S.Ct at 1866]." *Furnco Construction Corp. v. Waters, supra,* 438 U.S. at 577, 98 S.Ct. at 2949. The four *McDonnell Douglas* requirements, however, do not represent the exclusive method of showing disparate treatment under Title VII. They are "not necessarily applicable in every respect differing factual situations," *McDonnell Douglas Corp. v. Green,* 411 U.S. at 802 n.13, 93 S.Ct. at 1824 n.13. As the Court pointed out in *Teamsters v. United States, supra,* 431 U.S. at 358, 97 S.Ct. at 1866:

> "The company and union seize upon the *McDonnell Douglas* pattern as the *only* means of establishing a prima facie case of individual discrimination. Our decision in that case, however, did not purport to create an inflexible formulation . . . The importance of *McDonnell Douglas* lies, not in its specification for the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act."

Since "[t]he method suggested in *McDonnell Douglas* is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the question of discrimination." *Furnco Construction Co. v. Waters, supra,* 438 U.S. at 577, 98 S.Ct. at 2949, a court need adhere

stubbornly to that case's specific formulae when common sense dictates the same result on the basis of alternative formulae. See *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979).

Once a plaintiff has made out a prima facie case of disparate treatment, the burden shifts to the employer to go forward with evidence of "some legitimate, nondiscriminatory reason for the employee's rejection," *McDonnell Douglas Corp. v. Green, supra.* 411 U.S. at 801, 93 S.Ct. at 1823; see *Board of Trustees v. Sweeney,* 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978). An employer union agreement permitting the employer to discriminate is no defense. "Rights established under Title VII . . . are 'not rights which can be bargained away - either by a union, by an employer, or by both acting in concert,'" *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 477 (D.C. Cir.1976), *cert. denied,* 434 U.S. 1086, 98 S.Ct. 1281, 55 L.Ed.2d 792 (1977) (quoting from *Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir.), *cert. denied,* 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971)). Where the employer comes forward with evidence of a legitimate reason, the complainant must then be offered the opportunity, by way of rebuttal,

> "to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a cover-up for a racially discriminatory decision." *McDonnell Douglas, supra.* at 805, 93 S.Ct. at 1825.

If the plaintiff shows that the employer's stated reason for rejecting him was a pretext, such as where the reason was not used to reject white applicants, the employer's reason will not stand. *Board of Trustees of Keene State College v. Sweeney,* 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978).

A prima facie case of discriminatory impact may be established by showing that an employer's facially neutral practice has a disparate impact on the plaintiff's racial group.

> "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30, 91 S.Ct. 849, 852-53, 28 L.Ed.2d 158 (1970).

Such a discriminatory racial impact is frequently evidenced by statistics demonstrating that the employer's selection methods or employment criteria result in employment of a disproportionately larger share of whites than of blacks out of a pool of qualified candidates. *Int'l Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335 n.15, 339, 97 S.Ct. 1843, 1854 n.15, 1856, 52 L.Ed.2d 396 (1977); *Hazelwood School Dist. v. United States,* 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977).

Against the inference of discrimination that may be drawn from disparate impact attributable to an employment practice, the employer may defend by showing a "business necessity" for the practice, i.e., that it is not based on race but on "genuine business need" and has a "manifest relationship to the employment in question," or "a demonstrable relationshipto successful performance of the jobs for which [the practice is] used," *Griggs v. Duke Power Co., supra,* 401 U.S. 424 at 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158.

The employer's burden of proving job-relatedness to rebut a claim of disparate impact is greater than its burden of merely showing a legitimate, non-discriminatory reason in response to a claim of discriminatory treatment. The hard, cold statistical record of impact provides a stronger circumstantial case of discrimination than a subjective claim of improper motivation. Despite evidence of some weaknesses in the statistics, where they disclose a glaring absence of minority representation in the jobs at issue, the burden on the employer increases since "fine tuning" of the statistics will not rebut an inference of discrimination derived "not from a misuse of statistics but from 'the inexorable zero.'" *Teamsters v. United States, supra,* 431 U.S. at 342 n.23, 97 S.Ct. at 1858 n.23.

Should the employer adduce evidence of business necessity the plaintiff must then be given an opportunity to show "that other selection devices without a similar discriminatory effect would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975) (quoting from *McDonnell Douglas Corp. v. Green, supra,* 411 U.S. 792, 801, 93 S.Ct. 1817, 1823, 36 L.Ed.2d 668); see also *Dothard v. Rawlinson,* 433 U.S. 321, 329, 97 S.Ct.2720, 2726, 53 L.Ed.2d 786 (1977). "If the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued," *United States v. Bethlehem Steel Corp.,* 446 F.2d 652, 662 (2d Cir. 1971); *Parson v. Kaiser Aluminum & Chemical Corp.,* 575 F.2d 1374, 1389 (5th Cir. 1978), *cert. denied,* 441 U.S. 968, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979).

If a plaintiff succeeds in establishing the defendant's liability, the question of who is entitled to relief then arises.

The question is easily resolved when named plaintiffs prove that they have been treated discriminatorily; each plaintiff who can prove individual discriminatory treatment is entitled to relief. The question becomes more complicated, however, when a class of plaintiffs prove that they were subject to a statutorily proscribed"pattern or practice" of discrimination, see 42 U.S.C. § 2000e-6(a), or some other form of improper practices resulting in disparate impact. In *Franks v. Bowman Transportation Co,*. 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1975), the Supreme Court held that proof of a discriminatory pattern and practice may justify a reasonable inference that each individual hiring decision was made in pursuit of the discriminatory policy, and thereby placed upon the employer the burden to come forward with evidence dispelling the inference, stating:

> "[P]etitioners here have carried their burden of demonstrating the existence of a discriminatory hiring pattern and practice by the respondents and, therefore, the burden will be upon respondents to prove that individuals who reapply were not in fact victims of previous hiring discrimination." *Id.* at 772, 96 S.Ct. at 1267.

See *Teamsters v. United States, supra,* 431 U.S. at 359, 97 S.Ct. at 1866.

Moreover, a victim of a discriminatory practice need not always show that his application was rejected in order to recover.

"Measured against these standards the company's assertion that a person who has not actually applied for a job can *never be* awarded seniority relief cannot prevail. The effects of and the injuries suffered from discriminatory employment practices are not always confined to those who were expressly

denied a requested employment opportunity. A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection." *Teamsters v. United States, supra,* 431 U.S. at 365, 97 S.Ct. at 1869.

Denial of relief under Title VII on the ground that the claimant did not formally apply for the job sometimes "could exclude from the Act's coverage the victims of the most entrenched forms of discrimination," *id.*, at 367, 97 S.Ct. at 1870. Where a discriminatory practice is established, the non-applicant may, in lieu of an application, show that he was within the class of victims who were the subject of unlawful discrimination and that an application would be fruitless, since it would be denied. The law does not require him to do a useless act in order to recover.

Applying these principles to the present case, we recognize that subjective word-of-mouth hiring methods, although suspect because of their propensity for "masking racial bias," *Barnett v. W.T. Grant Co.*, 518 F.2d 543, 550 (4th Cir. 1975), may be upheld despite apparent favoritism of whites over blacks sufficient to constitute a prima facie case, but only where they are necessary to insure that the safest and most competent workmen are hired. *Furnco Construction Corp. v. Waters, supra.*

At the outset, we find insufficient the district court's grounds for holding that plaintiffs failed to make out a prima facie *McDonnell Douglas* case of discriminatory treatment. Each of the appellants was concededly qualified to serve as a foreman (except that Grant could not supervise a "raising" gang). Each unquestionably applied for the position of foreman and was rejected or deferred. The main source of

contention is whether they applied for jobs that were available. Examination of the defendants' claims in this respect leads us to conclude that the jobs must be viewed as having been open.

With respect to Ellis' application to Superintendent Pistillo for a job as foreman at the Columbia-Presbyterian Hospital construction, which was then open, the court held that the Superintendent was justified in giving the job to another because "he was motivated by a desire to keep peace with the union" rather than by racial considerations. However, union pressure on an employer does not relieve the latter of its obligation to respect an applicant's Title VII rights, see *Laffey v. Northwest Airlines, supra.*

Similarly the rejection by Superintendents Deaver and Driggers of applications by all three appellants for foreman's jobs was excused on the ground that the superintendents already had filled the foremen's vacancies for the projects in question and had no current openings available. In addition, the appointment of a white ironworker (Del Duca), who was less qualified that appellants, to a welding foreman's position on a job where Grant was then employed, was justified on the ground that five months had elapsed since appellants had applied and Driggers could not be expected to remember the applications. These lame excuses, in view of other undisputed circumstances, are inadequate to establish that jobs were not available for the plaintiffs. The record is replete with examples of the superintendents' efforts to hire whites who had never applied to be foremen. Rejection of appellants' claims because they failed to apply often enough or at the correct times makes little sense here, in view of the supervisors' admitted practice of hiring foremen before openings formally became available and were announced, which rendered futile the making of applications for

foremen's jobs on specific projects. Each of the three named appellants clearly and repeatedly made his interest in a job as foreman known to at least one of the superintendents. This was sufficient to put the superintendents on notice that these men wanted a foreman's job. Under Title VII "a nonapplicant can be a victim of unlawful discrimination . . . when an application would have been a useless act serving only to confirm a discriminatee's knowledge that the job he wanted was unavailable to him." *Int'l Brotherhood of Teamsters v. United States, supra,* 431 U.S. at 367, 97 S.Ct. at 1870; *Dothard v. Rawlinson,* 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). Faced with an admittedly entrenched discriminatory system that had historically shown no inclination to make blacks foremen, appellants were not required to keep beating their heads against the wall by reapplying.

The Supreme Court's holding in *Furnco Construction Co. v. Waters, supra,* does not dictate a different result. There the Court held that employers had a responsibility only to offer blacks the same employment opportunities as whites, not to solicit blacks or otherwise devise hiring methods that would maximize black employment. Here blacks were not offered the same employment opportunities as whites. The district court stated that "if Bethlehem had taken affirmative steps to find qualified blacks, one or more additional black foremen would have been appointed," but concluded that Bethlehem's failure to take such steps could not be illegal, given the logic of *Furnco.* Contrary to the district court's conclusion, we believe that the failure to solicit qualified blacks as foremen constitutes a form of unacceptable discrimination in this case, since whites were here being solicited at the same time, even though the whites made no applications for the foreman's jobs for which they were hired.

The failure of Deaver, Driggers or any other Bethlehem superintendent to give a foreman's job to any of the appellants must also be viewed against (1) Bethlehem's "long history of discrimination against blacks in the hiring of ironworkers in the New York metropolitan area," (2) Judge Knapp's statement that in Mr. Deaver's mind "a black man had a much higher threshold of acceptability than a caucasian," and (3) the fact that although there were 102 blacks in Bethlehem's ironworker force at the time when 126 foremen were selected (almost entirely by Deaver and Driggers), only one black (Herrera) was chosen as a foreman and then only after community pressure. Under these circumstances we must conclude that appellants below made out a strong prima facie case of discriminatory treatment in violation of Title VII. To the extent that Judge Knapp's findings of fact are contrary to this opinion, we hold that they are clearly erroneous. *Dayton Bd. of Ed. v. Brinkman,* 443 U.S. 526, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979).

Nor can we accept the district court's conclusion that appellants failed to make out a prima facie case of discriminatory impact under Title VII. The undisputed statistics point strongly toward discrimination. After a "long history of discrimination against blacks in the hiring of ironworkers" Bethlehem during the 1970-75 period employed 1,018 ironworkers, of whom 102 were black or Puerto Rican. During the same period it appointed 126 whites as foremen and only 1 black. Aside from the three appellants, who were qualified for foremen's jobs, Superintendents Deaver and Driggers testified at trial that they had supervised blacks who they considered sufficiently competent to be foremen. Yet the district court rejected appellants' statistical case on the ground that foremen's positions filled with whites who had had prior experience as Bethlehem foremen (some 97) should not be counted but indeed should be deducted from the 126

foremen appointed in calculating available foremen's jobs, leaving only 29 openings for persons with no prior experience as Bethlehem foremen. We believe this was error.

This ruling violates the principle stated by the Supreme Court in *Griggs, supra,* 401 U.S. at 430, 91 S.Ct. at 853, that "[u]nder [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." Here, it is indisputable that allowance of hiring based soley on foreman experience would have operated to freeze the effects of past discriminatory hiring practices. In 1972, Judge Gurfein found that unions involved in the metropolitan New York structural steel industry had illegally discriminated against blacks, and ordered them to increase their non-white membership immediately. *United States v. Local 638 . . . . and Local 40,* 347 F.Supp. 169, 182 (S.D.N.Y. 1972). Many of the men whom the superintendents hired as foremen were first hired as foremen from the union during the 1960's, when blacks were effectively excluded from competing with them for these positions, and when the entire industry was rife with entrenched discrimination, see *United Steelworkers of America V. Weber,* 443 U.S. 193, 198 n.1, 99 S.Ct. 2721, 2725 n.1 61 L.Ed.2d 480 (1979). By treating as unassailable these whites' right to rehiring ahead of any black without foreman experience, the district court's narrowing of appellants' statistical case would allow Bethlehem to perpetuate impermissibly the results of its earlier discrimination.

Moreover, the district court's ruling runs counter to the principle that a prima facie case may be made by showing that blacks are concentrated in the "lower paying, less desirable jobs .... and were therefore discriminated against with respect to promotions and transfers." *International*

Brotherhood of Teamsters v. United States, 431 U.S. 324, 329, 337-38, 97 S.Ct. 1843, 1851, 1855, 52 L.Ed.2d 396 (1977). To the extent that Bethlehem superintendents may have been justified in selecting foremen from the ranks of Bethlehem employees having experience in that job, this represents a defense based on business necessity, not a basis for eliminating such employees from a statistical comparison used to make out a prima facie case.

Prior foreman experience is a factor properly considered in weighing the defense of business necessity. But without an inquiry into the nature and extent of the experience insofar as it may indicate superior competence on the part of the ironworkers, it cannot be categorized as a *sine qua non* for appointment as foremen. An incompetent foreman should not be repeatedly hired over a qualified ironworker without foreman experience merely because the former had the good fortune to have been hired once as a foreman. Here, appellants produced creditable evidence that the superintendents selected some foremen on the basis of friendship without knowledge of or inquiry into their prior safety history. Some of these foremen, as noted above, possessed bad safety records that would have excluded them from rehiring in a strictly merit-based hiring system. No business necessity dictated that these men be rehired without superintendents' assuming any responsibility to consider qualified blacks for the job.

The record, moreover, shows that fully 50% of the foremen hired on the 10 sample projects had worked for Bethlehem less than a year before being made foremen. Each of the named plaintiffs, who were qualified to be foremen, had longer Bethlehem tenure. Many of these other foremen did not have the extensive experience gained the appellants as ironworkers and foremen in outstanding companies other than

Bethlehem. Appellants adduced evidence that Bethlehem supervisors hired their sons, friends, and persons whom they trusted, often despite these men's relatively slight experience as Bethlehem ironworkers, even though persons with Bethlehem foreman experience (including appellant Martinez) were available for the job. Given this fact, we cannot accept the view that the positions for which prior foremen were hired should have been excluded as part of appellants' statistical case on the ground that safety dictated as a matter of business necessity that experienced foremen be rehired. Appellees cannot in one breath maintain that these positions should not be considered as part of appellants' statistical case because the rehiring of experienced foremen is so fundamentally necessary, and in the next breath assert that they acted reasonably in hiring friends and relatives with comparatively little experience ahead of experienced foremen like Martinez, on the basis of subjective judgments of the new candidates' competence. If these positions were open to qualified whites without foreman experience, they should also have been open to qualified blacks.

Appellees' second objection to appellants' statistical case, which was accepted by Judge Knapp, is that it was incorrect to view the entire Bethlehem ironworker force as the pool of qualified candidates for foreman positions. The presence of 10% blacks in the ironworkers' labor force, the argument goes, does not suggest that 10% participation in the foreman ranks should follow. Before 1972 there were few minority workers in the union, and most blacks who belonged to the union in 1975 had been members a relatively short time. Those blacks who belonged to the workforce during the early 1970's took up a comparatively larger segment of the apprentice and trainee pools. The legacy of admitted past discrimination gave blacks less average experience per man than whites. The ratio of qualified blacks to qualified whites

in the workforce, appellee conclude, was therefore substantially smaller than the overall percentage of blacks in the workforce.

This background, thought partially true, does not justify the assumption that there were *no* appreciable blacks in the workforce with the ability to be good foremen. Though the union had few black members in the early 1970's, many black "permit" workers were working on iron work projects during that period, and some even earlier. See *United States v. Local 638 and Local 40, supra.*[2] Some black workers, including the three named plaintiffs, had more experience at Bethlehem and elsewhere than at least several of the whites hired as foremen. Moreover, as all parties have recognized, experience is only one of several factors to be considered when selecting foremen. It defies common sense to suggest that only one black was sufficiently experienced and competent to merit selection as a foreman during this period when 126 foreman job were filled. It would not have created any substantial difficulty for supervisors to maintain a pool of "eligibles" to be notified of foreman openings, from whom they would choose the foremen for new projects. Such a pool would undoubtedly have contained some qualified blacks. Along these lines Bethlehem incorporated its self generated "Guide to Equal Employment Opportunity" in contracts for federally funded projects, thus demonstrating its

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[2] Ironworkers did not have to belong to unions. They could obtain permits to work on specific projects, and were allowed access to union halls to determine what jobs were available. Martinez, for example, was a permit worker before joining the union. These permit workers of course did not enjoy the coveted privileges of union membership. Judge Gurfein's opinion in *United States v. Local 638 and Local 40, supra,* recognized that blacks belonged to the ranks of permit workers in significant numbers, but found that the union was discriminating against blacks in its selection of fullfledged members.

belief that a non discriminatory hiring procedure other than by the subjective word-of-mouth method was feasible. Had it followed the Guide in practice, an equal opportunity would have been afforded to blacks and Puerto Ricans to become foremen. It could just as easily have given adequate opportunity to blacks in its privately funded projects.

For all of these reasons we hold that appellants have made out a prima facie case of not only discriminatory treatment but discriminatory impact as well. We remand the case to permit appellees to introduce additional evidence that their discriminatory conduct may have been justified by business necessity, and for any rebuttal testimony by the plaintiffs. As the evidence thus for introduced is insufficient to meet the burden on the defendants, if no additional defensive evidence is offered the sole remaining issue would be backpay damages.[3] The order is reversed and the case remanded for further proceedings consistent with the foregoing.

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[3] We do not view our decision in *EEOC v. Enterprise Assn. Steamfitters*, 542 F.2d 579, 588 (2d Cir.), *cert. denied*, 430 U.S. 911, 97 S.Ct. 1186, 51 L.Ed.2d 588 (1976), as barring an award of backpay damages to ironworkers who (unlike the named appellants) did not apply for positions as foremen. However, they would first be required to prove that they were fully qualified to be foremen, and that they failed to apply because it would have been futile to do so. The situation confronted in *Enterprise Assn. Steamfitters* is clearly distinguishable, involving the speculative hypothesis that wholly unqualified applicants for a union apprenticeship program *might* have passed a non-discriminatory test for admission, *might* have progressed satisfactorily through a three to four year program to graduation, and *might* then have succeeded in obtaining employment as steamfitters. No such situation exists here, where even Superintendents Deaver and Driggers testified that some minority ironworkers under their supervision had performed satisfactorily and were capable of becoming foremen.

APPENDIX H

Grant v. Bethlehem Steel Corp.,
No. 76 Civ. 0847 (WK)
(S.D.N.Y. June 28, 1985)

Affidavit in Support of
Proposed Settlement of Class Action

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 76 Civ. 847 (WK)

ROYSWORTH D. GRANT, WILLIE ELLIS,
on behalf of Themselves and All Other Similarly Situated,
Plaintiffs,

—and—

LOUIS MARTINEZ,
Plaintiff-Intervenor,

—against—

BETHLEHEM STEEL CORP., E. RICHARD DRIGGERS, JAMES DEAVER and THOMAS R. CONNELLY,
Defendants.

AFFIDAVIT IN SUPPORT OF PROPOSED SETTLEMENT OF CLASS ACTION.

RICHARD A. LEVY, being duly sworn, deposes and says:

1. I am one of the attorneys along with Lewis M. Steel and Michael D. Ratner representing the class in the above entitled case. I submit this affidavit in response to Magistrate Leonard Bernikow's request for an affidavit setting forth the basis of counsel's assertion that the $60,000 settlement

offered by defendants represents as much or more than the plaintiff class is likely to recover if this case goes back to trial.

2. Based on statistics, $60,000 is approximately the amount of money that black and Hispanic ironworkers might reasonably have been expected to earn—above what they actually earned—if black and Hispanic ironworkers had been represented among the ranks of foremen in the same percentage as they were represented among ironworkers employed by the Company during the relevant time period.

3. What follows are the steps we took in calculating the $60,000 figure. We have tried to show all of the facts and assumptions upon which the calculation was based.

First: We figured that plaintiffs' back pay claims, at most, could run back to February, 1973 (three years before the complaint was filed) and could continue, at most, to the end of 1976, when Bethlehem went out of the structural steel business. This was based upon the assumption that plaintiffs could win on their claim of discrimination under the Civil Rights Act of 1866 [29 U.S.C. § 1981] which has a three-year statute of limitations as opposed to the two-year back pay limit imposed by Title VII of the Civil Rights Act of 1964, 29 U.S.C. §2000e-5(g).

Second: We looked to see how many white foremen were working in each of those years (1973 to 1976). From the tables annexed as Exhibit "A" (Pl. Ex.41)[1] we found that there were seventeen (17) white foremen working for Bethlehem Steel Corporation in 1973. In 1974 eleven (11)

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[1] "Pl." refers to Plaintiffs' trial exhibits, "Def." refers to Defendants' trial exhibits. In other words Ex. "A" was Plaintiffs' Exhibit 41 at trial.

additional whites became foremen; eight (8) more whites became foremen in 1975 and one (1) more in 1976. [The names of these white foremen appear on Exhibit "B" annexed hereto.]

Third: We then sought to determine the amount of foremen's work that these 37 white foremen performed. To do so we had to determine how long each of them worked during the relevant time period. Since this was difficult to calculate we made the assumption that the 17 men who were on the payroll as foremen in 1973 worked continuously unitl the end of 1976. We assumed that all of the foremen who began in 1974 or 75 also worked straight through until the end of 1976.[2]

Fourth: Since the foremen who began in 1973 began at various times in 1973, we assumed that, on average, they worked a half year in 1973 and three additional years until the end of 1976 (i.e., 3.5 years all together). Those who began in 1974 were assumed to have worked 2.5 years and those who began in 1975 were presumed to have worked 1.5 years.

Fifth: We next had to determine how much of this foreman's work, statistically speaking, should have been performed by black and Hispanic ironworkers. He knew that black and Hispanic ironworkers constituted approximately 10% of the ironworkers working for Bethlehem Steel Corporation [Exhibit "C" (Pl.58)] and that they made up approximately 10% of the Union's membership. [Exhibit "D" (Pl.57)].

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[2] Actually, all of these men did not work until the end of 1976, only a few did. This assumption was made to simplify the calculation, although it obviously inflates the hypothetical damage figure.

Sixth: We assumed that black and Hispanic ironworkers in the work force possessed the same qualifications to be foremen as the white ironworkers in the work force. We thus concluded that 10% of all foremen employed during this period (1973-1976) would have been black or Hispanic, had there been no discrimination.

Seventh: Based on the above, we figure that of the seventeen (17) foremen working in 1973, 1.7—actually two (2)—should have been black or Hispanic and should have enjoyed 3.5 years of foremen's employment (see step "Fourth" above). Similarly, in 1974, one (1) of the eleven (11) foremen should have been a black or Hispanic ironworker and he should have worked for 2.5 years. One (1) of the eight (8) foremen who began in 1975 should have been black or Hispanic and that individual should have enjoyed 1.5 years of foremen's work.

Eighth: The result of these calculations can be shown by a table which leads to the conclusion that, statistically, the class was deprived of a total of 11 years of "foremen's work."

Years	White Foremen	10% Black and Hispanic		Lost Years of Work Per Minority Foremen		Total Lost Years of Work for Minority Foremen
1973	17	- 2	x	3.5	=	7
1974	11	1	x	2.5	=	2.5
1975	8	1	x	1.5	=	1.5
1976	1	—		—		—
	37	4		—		11.0

Ninth: We next determined the difference between foremen's earnings and ironworker earnings so we could find the amount of money lost to the class as a result of having been deprived of 11 "Foreman Years" to which they were entitled. Our source of ironworker earnings came from Exhibit "E" which is a summary of earnings by year of minority ironworkers taken from Local 40 pension and welfare records. The source of foremen's earnings (Exhibit "F") was furnished by Bethlehem Steel Corporation.[3]

Tenth: To determine the difference between foremen earnings and ironworker earnings we compared the annual salary of the highest 20% in each group. We did this because foremen and superintendents who had small earnings from Bethlehem Steel Corporation may have earned substantial amounts with other steel erection companies during the same year. Similarly, ironworkers with lower earnings (wage rates were the same for all) may have worked out of industry (e.g., in fabrication shops) when not working in a "Local 40 job." We made the assumption that the highest paid iron workers worked pretty much full-time in the industry and that the highest paid foreman worked close to full-time for Bethlehem.

Eleventh: Annexed as Exhibit "G" are the names and earnings of the highest paid 20% of Bethlehem foremen in each year from 1973 through 1976. (This actually includes foremen, hourly superintendents and superintendents and is based upon Exhibit "F".) Annexed as Exhibit "H" are the names and earnings of the highest paid 20% of black and Hispanic ironworkers in each year 1973 through 1976 (based on Exhibit "E"). The difference between the earnings of

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[3] The transmittal letter from Bethlehem's attorney describing this exhibit appears at the end of the Exhibit.

foremen and the earnings of ironworkers for each of the years in question is shown on the chart below.

Year	Average Earnings of Supervisors in Top 20%	Average Earnings Top 20% of Minority Ironworkers	Difference Between Supervisor and Ironworker Earnings
1973	$22,842	$17,830	$5,012
1974	25,056	18,447	6,609
1975	24,352	20,494	3,858
1976	27,696	20,585	7,111

Twelfth: Based on the above chart, we determined that the average annual difference in earnings between supervisors and ironworkers was $5,647. For simplicity, we rounded this number to $5,600.

Thirteenth: To find out the lost earnings to which the class might be entitled, we multiplied the lost "foremen years" (11 years) times the average annual differential between ironworkers and foremen during this period ($5,600) and came out with a total lost earnings figure of $61,600. This might be shown more graphically as follows:

Years	Black and Hispanic Foremen Positions		Lost Years of Work for Each Foreman		Lost Dollars Per Year	=	Lost Total Earnings
1973	2	x	3.5	x	$5,600		$39,200
1974	1	x	2.5	x	$5,600		14,000
1975	1	x	1.5	x	$5,600		8,400
							$61,600

WHY PLAINTIFFS MAY NOT HAVE WON $60,000 AFTER TRIAL

A. *Plaintiffs Might Have Lost The Case*

While it is our belief that plaintiffs would have shown that Bethlehem's practices discriminated against them and would have received some or all of the $60,000 referred to above, experienced counsel must consider the *possibility* that plaintiffs might have lost after trial. Bethlehem intended (see Exhibit "I") to retry every possible question bearing on liability including the relative qualifications of each and every black or Hispanic ironworker and each foreman who was actually hired. Many of Bethlehem's foremen had very long prior service with the company [see Exhibit "J" (Defs. x)] as compared to minority ironworkers working for the company [Exhibit "K" (Defs. W)]. Counsel was also mindful that the trial judge who would hear the case had previously dismisssed the complaint after holding that plaintiffs' proof of discrimination was insufficient.

B. *Plaintiffs Might Have Won Less Than $60,000*

The above calculations are based on certain assumptions which counsel believe are reasonable. However, we know that Bethlehem intended to challenge these assumptions vigorously if the case went back to trial. We could expect that they would make the following arguments:

(i) Bethlehem would argue that the black and Hispanic ironworkers *as a group* were less qualified to fill foremen positions then the white ironworkers as a group. It would argue, as it did before, that among the white ironworkers there already existed a large pool of men who were "tried and proven" Bethlehem foremen. It would also argue that a

disproportionately high number of the black and Hispanic ironworkers employed by Bethlehem were either trainees, coalition members, apprentices or otherwise not men with long-term ironwork experience. If they proved this, plaintiffs might not have established their right to 10% of foreman jobs. In that case the recovery might have been less than $60,000.00.

(ii) Bethlehem would argue that there was only a two-year and not a three-year back pay period (as we have assumed), because their practices, even if discriminatory in effect, were undertaken without discriminatory intent. Thus, they would say, recovery can be had under Title VII (2-year back pay period) but not under 42 U.S.C. §1981 (3-year statute of limitation) which requires proof of intent. Given that the District Court found insufficient proof of discrimination after the first trial, counsel had to consider the possibility that the Court would not find *intentional* discrimination after a second trial and therefore award back pay for only a two-year period.

Conclusion

Before we proposed this settlement with Bethlehem, several things had become clear: first, after more than a year of extremely intense negotiations we were reasonably certain that Bethlehem was not going to voluntarily pay more than the $60,000 it had offered. Second, it was clear that Bethlehem was prepared to litigate this case fully and would spare no expense or effort in its attempt to win. Thus, plaintiffs faced lengthy pretrial preparation, a protracted trial and almost certainly an appeal by the loser. Litigation could easily have gone on for another five years. Moreover, there was a possibility that the class would wind up with nothing or less than the $60,000 Bethlehem had offered. Under these

circumstances, class counsel concluded that it was plainly in the best interest of the class to accept the $60,000 which would then be divided among those experienced ironworkers who in fact might reasonably have expected to fill foreman positions with Bethlehem.

WHEREFORE, it is respectfully requested that the Court approve the proposed settlement as being in the best interests of the members of the class.

/s/ RICHARD A. LEVY

RICHARD A. LEVY

Sworn to before me this
28th day of June, 1985

/s/ ZELDA ANGIEL

ZELDA ANGIEL
Notary Public
[SEAL]

APPENDIX I

Grant v. Bethlehem Steel Corp.,
No. 76 Civ. 0847 (WK)
(S.D.N.Y. Nov. 12, 1985)

Reply Affidavit in Support of
Proposed Settlement of Class Action

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 76 Civ. 847(WK)

ROYSWORTH D. GRANT, et al.,

Plaintiffs,

—against—

BETHLEHEM STEEL CORPORATION, et al.,

Defendants.

REPLY AFFIDAVIT IN SUPPORT OF PROPOSED SETTLEMENT OF CLASS ACTION.

RICHARD A. LEVY, being duly sworn, deposes and says:

1. This affidavit is submitted in reply to the affidavit of Willie Ellis (dated Sept. 27, 1985) which opposes the proposed settlement of this class action suit and requests the dismissal of class counsel.

A. Knowledge of The Litigation By Class Members.

2. Mr. Ellis has obtained signatures on approximately 20 identical affidavits which state, first, that the signatories oppose the settlement and, second, that they "have never been informed by the attorneys who were supposed to be representing the class of black and Hispanic ironworkers that this

case even existed, let alone that any settlement proposal was being considered." As to the second point, these affidavits are demonstrably untrue. Consider the affidavits of the following ironworkers:

Clarence Clouden not only knew of this case but he gave an affidavit to Local 40 in support of its application to decertify the class. (Exhibit A). Moreover, having learned about this lawsuit he came to my former firm, Eisner, Levy, Steel and Bellman, P.C. in 1978 seeking representation on his own claims against another structural ironwork company, D. Koch & Co., Inc. We obtained a settlement before the State Division of Human Rights under which Clouden and the two named plaintiffs in this case obtained employment with the Koch Construction Company. (A copy of the settlement is annexed as Exhibit B).

Curtis Brown's affidavit also says he did not know of the existence of this lawsuit. Annexed as Exhibit C is an affidavit submitted by Curtis Brown *in this case* in support of plaintiff's motion to enjoin Local 40 from pressuring class members to opt out of the lawsuit.

Nesco Lettsome also denies prior knowledge of this lawsuit. Lettsome was in our office on numerous occasions in regard to this case and I believe was a regular attendee at the trial. In addition, Mr. Lettsome submitted an affidavit to the court in connection with the above referenced motion to halt pressure against class members. See Exhibit D.

William Rodriguez who denies prior knowledge of this lawsuit, submitted an affidavit in this case (Exhibit E) in support of Local 40's motion to decertify the class. Ironically, Mr. Rodriguez' affidavit dated November 29, 1978, specifically states as follows:

"I have been advised of the pendency of a class action in the Federal District Court for the Southern District of New York in which Messrs. Ellis, Grant and Martinez, other members of Local 40, are seeking to represent a class of minority ironworkers within the jurisdiction of Local 40 with regard to alleged discrimination against such class."

3. The above affidavits obtained and submitted by Mr. Ellis totally discredit his challenge to the proposed settlement and the methods he is employing to achieve his ends. Parenthetically, it is inconceivable that ironworkers - particularly minority ironworkers - in this jurisdiction were not fully aware, from the beginning, of the existence and purpose of this litigation. The lawsuit involved their union as well as Bethlehem. Numerous minority ironworkers, including Lettsome, and Clouden met with the undersigned on several occasions regarding this lawsuit. I believe at least a dozen minority ironworkers attended the trial in 1977 on a daily basis. Obviously they spoke with fellow ironworkers and spread the word about the case.

4. We have previously submitted to this Court affidavits and copies of correspondence showing the extent of our communication with the named plaintiffs regarding this proposed settlement. [See my Affidavit in Opposition to Motion to Dismiss Class Counsel, dated April 23, 1984 and Exhibits A & B attached thereto]. We assumed that the individual plaintiffs were discussing the settlement issues with their colleagues who they are representing in this case. Yet, we hear no objection to the settlement from anyone other than the named plaintiffs until the Court hearing on June 17, 1985).

B. *The Adequacy of the Settlement*

5. The challenge to the settlement is based on several false assumptions and unsound arguments. They include (a), that recovery in this case is not limited to ironworkers who were "in a position to be elevated to foremen," [Ellis aff. paras. 3 and 4], (b), that recovery was not necessarily limited to employees of Bethlehem Steel Corporation [Ellis aff. paras. 3 and 5], and (c), that relief was not necessarily limited to back pay for a period from 1973 through the end of 1976 [Ellis aff. paras. 8 and 9].

6. This case was limited to the issue of discrimination at the supervisory level from the time the class was certified. The class certification order (Exhibit F) states;

> "The class against said defendants includes all black and Puerto Rican ironworkers who may have been qualified or otherwise eligible to be *hired, upgraded and promoted to or considered or trained for any supervisory position* with Bethlehem Steel Corporation at any of its structural steel construction projects within the greater New York Metropolitan area ..."

Nor has there been any doubt in the subsequent proceedings that the issue in this case was limited to the Company's failure to hire or promote black and Hispanic ironworkers into supervisory positions. The decision of the District Court, after trial, began as follows:

> "This is a class action by three ironworkers (two blacks and one dark skinned Hispanic) against Bethlehem Steel Corporation and three of its supervisory employees. *Plaintiffs claim that they and others similarly situated were*

deprived of the opportunity to become Bethlehem foremen because of their color or race."

The Circuit Court decision is equally clear. Apparently adopting the District Court's language, the Court of Appeals decision begins with these words:

> "Appellants, two black and one dark skinned Puerto Rican ironworkers, brought this class action against Bethlehem Steel Corporation and three of its supervisory employees in the District Court for the Southern District of New York, *alleging that it had discriminated against blacks and Hispanics in its selection of ironwork foremen,* thereby violating Title 7 of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) et seq., 42 U.S.C. §1981 and Executive Order 11246, and as a remedy sought back pay.

In short, the argument that the settlement should have reflected relief for all blacks and Hispanics "not merely those in a position to be elevated to foremen" is utterly baseless, given the history of this litigation.

7. Mr. Ellis also questions whether participation in the settlement should have been limited to ironworkers who were actually employed by Bethlehem Steel Corporation. It is conceivable that an ironworker who had no Bethlehem employment experience might have had a claim of discrimination against the company if he had presented his credentials to the company and sought employment in a supervisory slot. Out efforts at the time of trial to locate any minority ironworker apart from the named plaintiffs who had applied for a supervisory position were entirely unsuccessful. It is virtually certain that back pay would not be awarded to ironworkers who were never employed by Bethlehem as

ironworkers and never sought supervisory employment with the company.

8. Mr. Ellis, in support of his argument that iron-workers without Bethlehem experience could recover in this case quotes the Second Circuit's reference to the fact that nonapplicants may have suffered discrimination since a known discriminatory policy may deter application. (Ellis aff. page 4). But this is obviously a reference to ironworkers employed by the company who may have been deterred from applying for positions higher than the level of ironworker. It cannot seriously be argued that ironworkers were deterred form applying for entry level positions with the company, since on most of its jobs, Bethlehem employed a higher percentage of black and Hispanic employees than their percentage in the union from which they were referred. Thus, it is doubtful that the Circuit was endorsing a theory of recovery on behalf of ironworkers who never worked for Bethlehem Steel at all.

9. Ellis argues that the time period used to calculate back pay (from February 1973 to the end of 1976, when Bethlehem quit the structural steel business) was to short, since Bethlehem could have been directed to employ minority supervisors in its other businesses. And, he says, Bethlehem might also have been ordered to finance affirmative relief beyond back pay, e.g., training programs. Here, we are confronted with a question of probabilities. It is *possible* that the District Court, after a completed trial, would have determined that Bethlehem's discrimination was of such a nature that affirmative action would be required notwithstanding that the company no longer had a structural steel business in this country. Perhaps it would have required the company to employ plaintiffs as supervisors in ship repair work or in the steel fabricating plants, or ordered a supervisory training

program to be set up. It was counsel's judgment that an award of such relief was extremely unlikely. We are aware of no case in which a company no longer engaged in the business in which the discrimination occurred, has been directed to employ people elsewhere or to provide training. Counsel was also mindful that the District Court to which the case would return was unlikely to fashion a drastic or far reaching remedy since it found no prima facie case initially, much less intentional discrimination. Under these circumstances, back pay seemed the only probable form of relief. And back pay, based on lost employment opportunities with Bethlehem in steel erection would only have accrued during the period from 1973 through 1976.

10. Finally, there are a number of assertions and arguments made in the Ellis affidavit which simply reflect a misunderstanding, if not a willful distortion, of counsel's position. I never stated, in support of this settlement, that "only 11 blacks could have been promoted to the position of foreman." The number 11 is the number of class members who applied to participate in this settlement. Apparently this is the number of black and Hispanic ironworkers who believe they can qualify under the settlement formula. As noted above and in our original papers, the eligibility standards reflect our judgment of minimum qualifications to become a foreman based upon the employment histories of white ironworkers who became foremen. Parenthetically, the number 11 does not seem particularly low, when one considers the following factors: (a) from 1970 through the end of 1976 only 75 black and Hispanic ironworkers worked on the 10 Bethlehem projects in the metropolitan area, (b), many of these ironworkers were relatively new to the industry, and, (c), 32 out of the 75 were apprentices, trainees or coalition members (the last two categories generally being comprised

of community people brought onto the job to fill affirmative action requirements). (See Exhibit G).

11. The Ellis affidavit goes on to belittle our concern that plaintiffs could lose this case at trial, since, he says, "the Second Circuit has already ruled on the issue of liability." This assertion is obviously not true. The Circuit merely determined that the District Court erred in finding no prima facie case. The court remanded the case "to permit appellees to introduce additional evidence that their discriminatory conduct may have been justified by business necessity, and for any rebuttal testimony by plaintiffs." Counsel believes that plaintiffs have a strong case on liability, but the matter was not finally determined by the Court of Appeals. Bethlehem advised counsel and the court that, on remand, it would present evidence concerning every single foreman selection made by the company, to show that in each case the appointed supervisor had as great or greater qualification than any black or Hispanic ironworker known to the company at the time. Since the vast majority of Bethlehem's supervisors had long employment with the company, including in most cases, substantion experience as foremen ,proof of discrimination against *any particular* black or Hispanic ironworker may well have been problematic.

12. In short, the challenge to the settlement is based upon misreadings of the scope of the litigation and unrealistic assertions about the potential post-trial recovery. The objectors offer no sound assessment of how a higher amount than the proposed settlement figure could be recovered after trial. Nor do the objectors address the issue of the time and cost of additional litigation which would be spent seeking their improbable goals. Apparently, no attorney has yet been found who will identify him or herself with the objectors' position. The objectors have a "gut" dissatisfaction with the

amount of the settlement. This is understandable. They feel that a big company like Bethlehem should pay more if it discriminated against black and Hispanic ironworkers. I agree with the feeling. But upon any reasonable legal analysis the settlement sum fairly reflects what is likely to be recovered after trial.

13. Federal courts in reviewing settlements in class action cases have routinely looked to whether or not (a), the settlement was arrived at after arm's length negotiations between the parties, (b), class counsel was experienced in similar cases, and, (c), there was sufficient discovery to enable counsel to act intelligently. See, e.g., *Plummer v. Chemical Bank,* 668 F.2d 654 (2d Cir. 1982); *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093 (2d Cir. 1977); *George v. Parry,* 77 FDR 421 (S.D.N.Y)., *aff'd mem.* 578 F.2d 1367 (2d Cir. 1978), *cert. den.* 439 U.S. 947 (1978). In this case, not none iota of evidence has been submitted that the settlement was collusive. To the contrary, it is clear that the settlement reached after long and arduous arm's length negotiations between the parties. Moreover, class counsel is experienced and in fact consulted other experienced counsel before agreeing to the settlement. Further, there was more than sufficient discovery to enable counsel to act intelligently. Under such circumstances, settlement may be upheld despite the objections of either the individual plaintiffs or members of the class.

14. In *Weinberger v. Kembrick,* 698 F.2d 61, 73 (2d Cir. (982), *cert. den.*, 104 S.Ct. 77 (1983), Judge Friendly wrote:

> "The central question raised by the proposed settlement of a class action is whether the compromise is fair, reasonable and adequate....The primary concern is with the substantive terms of the settlement: 'basic to this....is the

need to compare the terms of the compromise with the likely rewards of litigation'" [citation omitted].

Due to fact that Bethlehem went out of the structural steel business years ago, the possibility of obtaining injunctive relief is nil. Realistically, then, monetary relief is the only remedy which plaintiffs and the class could expect after trial. As discussed above and in our original affidavit, it is counsel's view that in all likelihood a recovery in this case would be limited by a formula very much like the utilized in calculating the settlement sum proposed here. In reaching this determination, class counsel considered the rulings in the following cases as being indicative of what the outcome would be here, assuming they could prevail at trial: *Ingram v. Madison Square Garden Center,* 709 F.2d 807 (2d Cir. 1983); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 263 n.45 (5th Cir. 1974); *Stewart v. General Motors Corp.*, 542 F.2d 445 (7th Cir. 1976); *United States v. U.S. Steel Corp.*, 520 F.2d 1043, 1056 (5th Cir. 1975), *cert. den. sub nom, U.S. Steel Corp. v. United Steelworkers of America,* 429 U.S. 817 (1976).

WHEREFORE, for the reasons set forth above, and those set forth in counsel's affidavit of June 28, 1985, the proposed settlement should be approved and the application to dismiss class counsel should be denied.

/s/ RICHARD A. LEVY

RICHARD A. LEVY

Sworn to before me this
12th day of November, 1985.

/s/ ZELDA ANGIEL

ZELDA ANGIEL
Notary Public
[SEAL]

APPENDIX J

42 U.S.C. § 2000e-5(k)
and
42 U.S.C. § 1988

42 U.S.C. §2000e-5(k) Attorney's fee; liability of Commission and United States for cost.

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. §1988. Proceedings in vindication of civil rights; attorney's fees; expert fees

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.